Wayne Read

SUPREME COURT OF THE UNITED STATES.

No. 321.

300 BASKETS OF CHAMPAGNE MARKED H. G. & CO., R. FENERSTEIN, CLAIMANT, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

GOVERNMENT PRINTING OFFICE.

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Writ of error to circuit court.

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The President of the United States of America to the judges of the circuit court of the United States for the tenth judicial circuit in and for the northern district of California, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between 300 cases of champagne wine, marked "H. G. S. & Co.," R. Fenerstein & Co., claimants, and the United States of America, a manifest error hath happened, to the great damage of the said claimants, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in the District of Columbia, on the first Monday of December next, in the said Supreme Court, to be there and then held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Salmon P. Chase, Chief Justice of the said Su-
[SEAL.] preme Court of the United States, this 16th day of October, A. D. 1865, and of the independence of the United States the ninetieth.

GEO. C. GORHAM,
Clerk U. S. Circuit Court, Tenth Circuit,
and Northern District of California.

The above writ of error is hereby allowed.

OGDEN HOFFMAN,
District Judge.

UNITED STATES OF AMERICA, ss:

To the United States of America, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be held at the city of Washington on the 4th day of December, A. D. 1865, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the tenth judicial circuit in and for the northern district of California, wherein R. Fenerstein & Co., claimants of 300 baskets of champagne, marked "H. G. S. & Co.," are plaintiffs and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme
[SEAL.] Court of the United States, this 16th day of October, A. D. 1865, and of the independence of the United States the ninetieth.

OGDEN HOFFMAN,
District Judge.

formation in that behalf alleged. And of this they put themselves upon the country.

Dated, San Francisco, July 20, 1865.

H. & C. McALLISTER,
Att'ys for Claimants.

Indorsed: Filed August 24, 1865.

GEO. C. GORHAM, *Clerk.*
By DAN'L T. SULLIVAN, *Deputy.*

7 *Verdict.*

And now at this day came the jurors sworn and empannelled to try the issues joined between the parties, and being asked if they had agreed upon their verdict, deliver their verdict as follows, to wit:

In the case of the United States, plaintiff, and 300 cases of champagne wine, marked H. G. S. & Co., defendant, we the jurors find for the plaintiff.

8 *Judgment.*

At a stated term of the district court of the United States of America for the northern district of California, held at the court-room in the city of San Francisco, on Tuesday the twenty-ninth day of August in the year of our Lord one thousand eight hundred and sixty-five.

Present, the honorable Ogden Hoffman, district judge.

THE UNITED STATES
vs.
300 cases champagne wine, marked H. G. S. & Co. } No. 182.—Judgment.

This cause having been regularly brought on for trial before a jury, and the jury, after hearing the evidence and allegations, having found in favor of the plaintiff, and that the goods, wares, and merchandise mentioned and set 9 forth in the libel of information in this cause are forfeited to the United States, for the reasons and causes in said libel set forth.

Now, therefore, it is hereby ordered, adjudged, sentenced, and decreed, and the court doth hereby order, adjudge, sentence, and decree, that the said goods, wares, and merchandise mentioned and set forth in the libel in this cause, be and the same are accordingly condemned as forfeited to the United States. And it is further ordered, adjudged, and decreed, that a summary judgment be and the same is hereby entered against Rudolph Fenerstein, principal, George H. Eggers and F. E. Vander Meden, sureties, for the sum of ten thous- 10 and five hundred dollars, lawful money of the United States, being the amount of the bond and stipulation given to the marshal on the attachment of the said three hundred cases champagne wine marked H. G. S. & Co., and that the said United States have execution to satisfy this judgment.

Indorsed: Entered August 29, 1865.

GEO. C. GORHAM, *Clerk.*
By DAN'L T SULLIVAN, *Deputy.*

11 In the district court of the United States in and for the northern district of California.

THE UNITED STATES
vs.
500 cases of champagne wine, each marked H. G. S. & Co., R. Fenerstein & Co. claimants. } 182

Bill of exceptions.

Be it remembered that the issues in this action came on for trial before the honorable Ogden Hoffman, judge of said district court, at a stated term thereof, held at the city of San Francisco, State of California, on the 25th day of
12 August, 1865; that a jury was called and sworn, and the plaintiffs by their counsel opened the case.

The plaintiffs, then, to maintain the issues upon their part, proved that R. Fenerstein & Co. were the agents of the firm of Veuve Clicquot Pousardin, of Rheims, France, and that the said firm were the owners of the goods proceeded against in this action.

That the said Veuve Clicquot Pousardin were, and for many years past had been manufacturers and dealers in champagne wines at the town of Rheims, in the empire of France.

That the wines in controversy in this action were manufactured by Veuve Clicquot Pousardin, at Rheims, and by them consigned through Messrs. H. G. Schmidt & Co., of New York, to R. Fenerstein & Co., at San Francisco, for sale.
13 That said wines were imported to San Francisco, via Bordeaux, in the French ship Armand Rose Andre, which ship sailed from Bordeaux on or about the 11th day of November, 1863, and arrived in the port of San Francisco on or about the 4th day of April, 1864.

That said Veuve Clicquot Pousardin, prior to the shipment of said merchandise, and on the 28th day of October, 1863, made and presented to the United States consular agent at Rheims an invoice thereof, a translation of which into the English language is as follows:

Invoice.

Per Messrs. Henry G. Schmidt & Co., at New York.

Forwarded for my account through Messrs. Finke & Co., at Bordeaux, rendered free at Bordeaux, for San Francisco—

(2) H. G. S. & C., No. 1,539, 4 at 15,618, 225 cases of 12 bottles.
(1) " " 6,368, at 6,442, 75 " 24½

14 300 cases.

Vin blanc de champagne, grand Mousseaux, of entire first quality—

At 38½	fcs.	for the wine of one case of 12 bottles				Fcs. 8,662.50
At 3½	"	glass	"	12	"	787.50
At 41	"	wine	"	24½	"	3,075
At 5	"	glass	"	24½	"	375
Total, all the expenses on board included						Francs 12,900
Commission 2 p. c.						258
						Fcs. 13,158

Each case is closed with four seals, the impression of which is here opposite.
Addition com. ½ p. c. $2,447 39
12

Rheims, October 28, 1863.
Con. cert. 2.56.
V. Cliquot Pousardin.
$2,461 95.
Duty 50.

And thereupon Baron de Sachs, one of said firm of Veuve Clicquot Pousardin, made and subscribed upon said invoice a declaration as required
15 by act of Congress of March 3, 1863.

And that, at the same time, said Baron de Sachs declared that said merchandise was intended for entry at the port of San Francisco, which declaration was duly certified by said United States consular agent in the said invoice, as required by law;

That said Veuve Clicquot Pousardin forwarded said invoice with said declaration endorsed thereon to H. G. Schmidt & Co., of New York, who transmitted the same to R. Fenerstein & Co., of San Francisco;

That on the — day of April, 1864, the said R. Fenerstein & Co., by F. Sievers, their agent and attorney in fact, presented the said invoice at the office of the collector of customs at the port of San Francisco, together with a bill of lading of said goods and demanded an entry of said goods on said
16 invoices, indorsements, and bills of lading, and thereupon said F. Sievers took and subscribed the consignee's oath as required by law on goods not procured by purchase;

And thereupon said goods were admitted to be entered and were entered at the prices stated in said invoice.

The plaintiffs then called as a witness Willard B. Farwell, who testified that for four years past he has been, and still is, United States naval officer for the port of San Francisco; that while such naval officer, and in the year 1864, he left San Francisco and proceeded to France, and visited Paris; that the champagne wine proceeded against in this action was manufactured at Rheims, France; that he, the said Willard B. Farwell, did not visit Rheims; that he has never been a manufacturer of, or dealer in, champagne wines, and that
17 he is not an expert as to the price thereof; that his business in Europe was to ascertain the prices of champagne wines; that he spent about three months in the investigation.

The witness testified that almost all the leading champagne manufacturers have agencies in Paris; that he inquired at several agencies for champagne at wholesale, for exportation, and the agents uniformly stated to him their prices.

That among other wine dealers in Paris was the house No. 6 Provence street, on the outside of which was a sign, E. Delenge Ragat, de la maison Minet Jenne and Co., Rheims.

That he called at said establishment, and was shown by the proprietor examples of various wines, who stated their wholesale prices, that he was also, at the same time, handed a printed price current, which he now produces.
18 The plaintiffs' counsel offered to read the said price current in evidence, to which the claimants' counsel objected, on the ground that such proposed evidence would be hearsay, and irrelevant and immaterial, and that such paper did not purport to state or give the wholesale price at Paris of the wines therein mentioned, but merely the price of the single bottle; that no actual transaction on the part of said Farwell, or any one else, had been proved, or was proposed to be proved, to have been based on such paper, or on the prices therein stated; that said paper had not, in any manner, been connected with the claimants, and that the wines mentioned, and stated in such paper, did not appear to be, and

had not been proved to be, of the same kind or quality as those proceeded against in this case.

The court overruled the objections, and admitted the price current in
19 evidence, to which ruling and decision the claimants' counsel duly excepted; a translation of which, into the English language, is as follows:

E. Delenge Ragot, of the firm of Moiet Jenne & Co., Rheims—Paris, No. 6. Provence street—from 2 to 6 o'clock.

Price current, fine champagne wines:

Carte d'or	Fr.6.00
Carte blanche	Fr.5.00
Choice bouzy	Fr.4.50
Excellent verzenay	Fr.4.25
Exquisite sillery	Fr.4.00
Parbadges eye	Fr.3.75
Foaming	Fr.3.50
Superior ay	Fr.3.00
Extra fine tisane	Fr.2.50

Gold-spangled champagne, patented, S. G., D. G.:

Imperial	Fr.6.00
Excellent boizy	Fr.5.00
Sillery	Fr.4.00
20 Veyeney	Fr.4.00
Ay	Fr.3.00

Price at Rheims, package included.

Other evidence was given on the part of the respective parties, but there was no evidence tending to prove that said Farwell had made any purchase of champagne wine while in France.

And the counsel for plaintiffs also asked the said Farwell, at said trial, the following questions:

Did you, upon inquiry at Paris, ascertain the difference in price between Rheims and Paris, as to Mumm champagne and as to Moet and Chandon champagne?

Whereupon the counsel for claimant did then and there, at the said trial, and before the said question was answered by the witness Farwell, object to the said question, as calling for irrelevant and immaterial testimony, also as
21 calling for hearsay testimony, also because it referred to champagne wines different in kind, price, and quality, from those proceeded against in this action.

And the said district judge did then and there, at the said trial, and before the said Farwell had answered said last question, give his opinion and decide, that the said question was proper and should be answered by said Farwell.

And thereupon the counsel for said claimants did then and there, at the said trial, and before the said Farwell had answered said last question, except to the said ruling and decision of said district judge; and the said Farwell then answered said question, and testified, before said court and jury, what he was informed by some of the wine dealers of Paris, France, concerning the
22 difference in price between Rheims and Paris, as to Mumm champagne, and as to Moet and Chandon champagne.

The claimants introduced testimony tending to show that champagne wines in the hands of the manufacturers in the champagne district of France, in a manufactured state, ready for consumption, have no fixed actual market value, and are not sold or dealt in at the place of production.

To rebut such evidence, and for the purpose of showing that such wines are held for sale, at current and fixed rates and prices, at which they are freely

offered and purchased, the plaintiffs' counsel proved that V. Ch. Farre was a manufacturer in champagne wines, at Rheims, and offered in evidence a letter from V. Ch. Farre, to Edward Leuchenrath, dated Rheims, November 5, 1863, its genuineness being admitted.

The plaintiffs also proved that Heidseick & Co. were large manufacturers of champagne wines at Rheims, and offered in evidence (its genuineness being admitted) a letter from said Heidseick & Co. to one Edward Leuchtenrath, dated Rheims, 2d November, 1863.

Also a letter from said Heidseick & Co. to Amos Hill, dated Rheims, April 28, 1864, its genuineness being admitted.

Also a letter from said Heidseick & Co. to Amos Hill, dated Rheims, May 11, 1864, its genuineness being admitted.

And the plaintiffs' counsel also proved that Eugene Clicquot was a large manufacturer of champagne wines at Rheims, and offered in evidence a letter from said Eugene Clicquot to Edward Leachtenrath, dated Rheims, 27 October, 1863.

Also a letter from Eugene Clicquot to Amos Hill, dated Rheims, April 29, 1864, its genuineness being admitted.

Also a letter from Eugene Clicquot to Amos Hill, dated Rheims, May 12, 1864. The plaintiffs' counsel also offered said letters in evidence to show, among other things, the market value of the wines referred to in said letters, with a view to show by comparison of quality and selling prices the market value of the Veuve Clicquot Pousardin champagne.

To the introduction of each and every of said 7 letters the claimants' counsel objected, as being immaterial and irrevelant; also as being *res inter alios acta*; also because they referred to champagne wines different in kind, price, and quality, from the "Veuve Clicquot Pousardin champagne," proceeded against in this action; also because said letters were not admissible under the pleadings in this case; also because no actual sale or purchase had been proved, or was proposed to be proved by said letters, or based upon, or connected with said letters; also because the letters to which these letters (the ones offered in evidence) were answers not offered or proposed to be offered in evidence.

And the said district judge did then and there at the said trial and before the said letters were given in evidence, give his opinion, and decide that the said letters were competent evidence, and might be read to the jury for the purposes for which they are offered by plaintiffs' counsel.

And thereupon the counsel for claimants did then and there at the said trial, and before the said letters were given or read to the jury, except to the said ruling and decision of said district judge, and thereupon the counsel for plaintiffs' gave said letters in evidence, and read the same to the jury.

Said letters were in the words and figures following, namely:

RHEIMS, 5 *November* 1863.

Mr. EDWARD LEUCHTENRATH, *at Paris, Cité Trevise* 10:

In answer, Monsieur, to your letter of the 4th inst., I have the honor to say to you that the qualities of my wines for exportation, also their prices, are.

Bensy Mousseux, francs, 4 per bottle,
Carte blanche, " 5 per bottle,
free in any French port.

The two half bottles are 25 centimes dearer than one whole one. Upon these prices I will accord to you *five per cent. commission and two per discount.* Per contra, I will reimburse myself by my bill upon you at one month from the date of the invoice.

I can furnish you these wines for all foreign countries except the dependencies of Brazil in all the markets of that country.

I have engagements which prevent me from shipping my wines to any other except those with whom I am in these relations.

Following your desires, I address to you herewith two models of my labels. Not selling any but superior wines, I give you very advantageous conditions, which I hope will be at your convenience.

In that belief, I present you, Monsieur, my sincere civilities.

28 (Signed,)

Par procuration, V. CH. FAVRE,
Handhaven.

RHEIMS, 2*d November*, 1863.

Mr. EDWARD LEUCHTENRATH, 10 *Cité Trevise, Paris:*

In reference to your favor of the 31st of last month, we have for exportation only one single quality of champagne, blanche Mousseaux, which we quote at the rate of 4 francs the bottle, taken at Rheims, payable in cash, with 5 per cent. discount.

Entirely at your command, accept, Monsieur, our salutations,

Signed, HEIDSEICK & CO.

RHEIMS, 28 *April* 1864,

Mr. AMOS HILL, *care Edward's Hotel, George st., Hanover Square, London:*

SIR: In answer to your letter dated Liverpool, 26 instant, we trans-
29 mit you as follows, the prices of our wines:

1st quality Monopole, 5 frs.; 2d do., Sillvia, 4.25c., the bottle, with three per cent. discount. Free on board in Havre.

If the wines have to sojourn in a warm climate we must be advised some time before shipment, as the casks are to be changed.

The choice of the wine must be equally made of less effervescing sort.

We remain, sir, respectfully, yours,

HEIDSEICK & CO., M. G.

RHEIMS, *May* 11, 1864.

Mr. AMOS HILL, *care of F. R. Morse, 67 Gracechurch street, London.*

SIR: In answer to your amiable lines of 8th instant, we regret to in-
30 form you that we have no wines with our brand below the price of 4 frs. 25c. To Panama we are at liberty to make shipments; but as we keep a large stock of wines in San Francisco, at our agency, P. Maury, jr., our arrangements with that gentleman do not allow us to forward any shipments to the last named port. All our wines in San Francisco are repacked after arrival, and no leak bottle is sold to the customers. We think, therefore, you will much be better off to take at our depot in S. F., as incurring the risks of ordering directly in Europe. We should be very obliged to you to direct your commands to our above-named agent, and remain, sir, with true respect,

Your obedient servants,

HEIDSEICK & CO., M. G.

RHEIMS, 27*th October*, 1863.

Mr. EDWARD LEUCHTENWRATH *Cité Trevise, No,* 10. *Paris.*

31 Responding to the letter which you did me the honor to write to me, under date of yesterday, I hasten to inform you that I sell but one single quality of champagne, "Mosseaux, qualité superieure." The price is francs 3.75 per bottle, and 4 francs for two half-bottles, taken in the cellar, payable at six months, or for cash under a discount of 3 per cent.

The costs of cases and packing are at the expense of a purchaser, and I usually include them in the way bill, at the rate of 20 francs for 100 bottles. My wines can be sent by sea when they are not exposed to excessive heat, or laden on ships with substances that exhale gases, such as coals, &c. They should not be put on ships loaded with guano

I put no etiquettes on bottles, except upon special request. In such cases the etiquettes are simple, on white paper, as you will see on the samples herewith sent.

I close the corks with wax or tin foil, according to the wishes of the purchaser.

Agree, &c., &c.,

(Signed.) EUGENE CLICQUOT.

REIMS, 29*th of April*, 1864.

Mr. AMOS HILL, *of Cal'a, Edwards's hotel, Hanover square, London.*

I received the letter which you have done me the honor to write to me, under date of Liverpool, 26th instant, and I hasten to answer it.

I sell only one single quality of champagne wine, "qualité superieux," (Eugene Clicquot brand.)

The price of this wine is 4 francs the bottle, and f. 4.25 thetwo half-bottles, taken at Rheims, packing included; and I accord 3 per cent. discount for payment in cash. I know perfectly well the kind of wine which suit the American taste.

My brand (marque) is also very highly appreciated in New York and California.

I have put the price at the lowest that I can sell wine, in consideration of the importance of your orders, and in the hope of establishing permanent relations with your respectable house.

Accept, Monsieur, my hearty salutations,

(Signed.) EUGENE CLIQUOT.

RHEIMS, 12*th May*, 1864.

Mr. AMOS HILL, *care of F. B. Morse, 67 Gracechurch street, London.*

I have received, Monsieur, your letter of the 8th instant. I regret that you found the price of my wines too dear. I might be able to offer you wines at 3 francs the bottle, and f.3.25 the two half-bottles, price at Rheims; but then these wines would not have my marque, (brand.) Perhaps you would do well to address my agents for the United States, Mr. James Behrens, at San Francisco, for the wines which you wish to use in the Pacific ocean, or Messrs. Stehn & Wolting, at New York, for the wines which you wish to use on the Atlantic ocean.

These gentlemen will sell to you at the lowest possible price, in bond or duty paid, as you may desire.

Accept, sir, my hasty salutations.

(Signed.) EUGENE CLIQUOT.

It was admitted that Eugene Cliquot had no connexion with the firm of Veuve Cliquot Pousardin.

And after the testimony in said cause was closed, and before its submission to the jury, the counsel for said claimant asked the court to give the jury therein the following instructions, to wit:

1st. That any valuation set by the claimant on his wine, or any offer by him to sell his wines at a price fixed by him, is not evidence of the fair market value, or of the usual buying and selling price of his wines, unless the jury, from the evidence, be satisfied that the claimant was in

the habit, at the place of manufacture, of selling his wines at such valuation or price.

Which instruction said district judge did, then and there, at the said trial, refuse to give to the jury, but instructed the jury that such offer was evidence but not conclusive; that an isolated offer to sell had no great weight, but if corroborated by other testimony, and in the absence of any evidence of sales or offers to sell at a lower figure, it was worthy of consideration by the jury.

And thereupon the counsel for claimants did, then and there, at the said trial, except to the said last-mentioned ruling and decision of said district judge; and after the testimony in said cause was closed, and before its submission
36 to the jury, the counsel for said claimants asked the court to give the jury therein the following other instruction, to wit:

2d. That the market value at the city of Paris, in France, of wines manufactured Vueve Cliquot Pousardin is not to be taken by the jury as the fair market value of the wines in controversy in this case, unless the jury shall believe that these wines were manufactured in Paris.

Which instruction said district judge did, then and there, at the said trial, refuse to give to the jury, but instructed the jury that though the value required to be stated in the invoice was the market value at Paris, yet the market value at Paris, if established by the evidence, was a fact which might be considered as tending to show the market value at Rheims.

37 And thereupon the counsel for claimants did, then and there, at the said trial, except to the said last-mentioned ruling and decision of said district judge; and after the testimony in said cause was closed, and before its submission to the jury, the counsel for said claimants asked the court to give the jury therein the following other instruction, to wit:

3d. That the law only punishes by forfeiture the attempt to defraud the revenue, or evade the duties, and therefore if the jury shall believe that Veuve Cliquot Pousardin made up their invoice of the wines in controversy, through a doubt of the requirements of the law or of its meaning, and not with a fraudulent design, their verdict must be for the claimants.

Which instruction said district judge did, then and there, at the said trial, refuse to give to the jury, but instructed them as is hereinafter set forth.

38 And thereupon the counsel for claimants did, then and there, at the said trial, except to the said last-mentioned ruling and decision of said district judge; and after the testimony in said cause was closed, and before its submission to the jury, the counsel for said claimants asked the court to give the jury therein the following other instruction, to wit:

4th. That the invoice in this case having been made out on the 9th day of September, 1863, and the wine mentioned therein having been shipped from Bordeaux in November, 1863, therefore the act of Congress, passed on the 3d day of March, 1863, is not applicable to such invoice, or to the goods mentioned therein, though the goods arrived at the port of San Francisco on the 4th day of April, 1864.

Which instruction said district judge did, then and there, at said trial, refuse to give to the jury, on the ground that it was an incorrect instruction.

39 And thereupon the counsel for the claimants did, then and there, at the said trial, except to the last-mentioned ruling and decision of said district judge; and after the testimony in said cause was closed, and before its submission to the jury, the counsel for said claimants asked the court to give the jury therein the following other instruction, to wit:

5th. That if there was not an actual market value, that is, wholesale market value, for manufactured champagne at Rheims at the time the invoice of the goods in question was made out, then that Veuve Cliquot Pousardin were justified in expressing in said invoice the value of these goods at their actual cost to the manufacturer

Which instruction said district judge did, then and there, at the said trial, refuse to give to the jury, but instructed them as is hereinafter set forth.

40 And thereupon the counsel for claimants did, then and there, at the said trial, except to the said last-mentioned ruling and decision of said district judge; and after the testimony in said cause was closed, and before its submission to the jury, the counsel for said claimants asked the court to give the jury therein the following other instruction, to wit:

6th. That the jury cannot find that these wines should be forfeited as undervalued in the invoice unless they are satisfied that said Veuve Cliquot Pousardin, in valuing said wines in the invoice, fraudulently undervalued them.

Which instruction said district judge did, then and there, at the said trial, refuse to give to the jury, but instructed them as is hereinafter set forth.

41 And thereupon the counsel for claimants did, then and there, at the said trial, except to the said last mentioned ruling and decision of said district judge.

And after the testimony in said cause was closed, and before its submission to the jury, the counsel for said claimants asked the court to give the jury therein the following other instruction, to wit:

7th. That if R. Fenerstein & Co. were the consignees or agents of the champagne wine proceeded against in this suit, and entered the same at the San Francisco custom-house, upon the invoice presented here by the plaintiffs, then the goods in question cannot be forfeited unless you are satisfied that said R. Fenerstein & Co. made, or caused to be made, said entry, knowing or believing said invoice to be false.

42 Which instruction said district judge did then and there, at the said trial, refuse to give to the jury, but instructed them as is hereafter set forth.

And thereupon the counsel for claimants did, then and there, at the said trial, except to the said last mentioned ruling and decision of said district judge, and after the testimony in said cause was closed, and before its submission to the jury, the counsel for said claimants asked the court to give the jury therein the following other instruction, to wit:

8th. That if F. Sievers acted as the attorney and agent of R. Fenerstein & Co. in entering the champagne wine proceeded against in this suit, at the San Francisco custom-house, upon the invoice presented here by the plaintiffs, then the goods in question cannot be forfeited unless you are satisfied that

43 said F. Sievers made said entry knowing or believing said invoice to be false.

Which instruction said district judge did, then and there, at the said trial, refuse to give to the jury, but instructed them as is hereinafter set forth; and thereupon the counsel for claimants did, then and there, at the said trial, except to the said last mentioned ruling and decision of said district judge.

And after the testimony in said cause was closed, and before its submission to the jury, the counsel for said claimants asked the court to give the jury therein the following other instruction, to wit:

9th. That that section of the act of Congress of March 2, 1799, which provides that when probable cause is shown for the prosecution the *onus*

44 *probandi* shall lie on the claimants, has no application to this case.

Which instruction said district judge did, then and there, at the said trial, refuse to give to the jury, but instructed them as is hereinafter set forth

And thereupon the counsel for claimants did, then and there, at the said trial, except to the said last mentioned ruling and decision of said district judge.

And after the testimony in said cause was closed, and before its submission

to the jury, the counsel for said claimants asked the court to give the jury therein the following other instruction, to wit:

10th. That the word "knowingly," in the first section of the act of March 3, 1863, means, in connexion with the language which accompanies and surrounds it, fraudulently.

45 Which instruction said district judge did, then and there, at the said trial, refuse to give to the jury, but instructed them as is hereinafter set forth.

And thereupon the counsel for claimants did, then and there, at the said trial, except to the said last mentioned ruling and decision of said district judge.

And after the testimony in said cause was closed, and before its submission to the jury, the counsel for said claimants asked the court to give the jury therein the following other instruction, to wit:

11th. That under the pleadings in this case plaintiffs cannot recover.

46 Which instruction said district judge did, then and there, at the said trial, refuse to give to the jury, but instructed them as is hereinafter set forth.

And thereupon the counsel for claimants did, then and there, at the said trial, except to the said last mentioned ruling and decision of said district judge;

The district judge thereupon charged the jury as follows:

GENTLEMEN OF THE JURY: You will perceive that this case is one of more than ordinary importance. On one side it is alleged that the object of the prosecution is not only to punish the particular fraud complained of, but to expose and break up an extensive combination in a foreign *combination in a foreign* country, whose artifices and operations are preying upon our

47 revenue, crippling our domestic industry, and driving our honest traders out of the market. On the other side it is alleged not only that the goods involved in this case were invoiced at their true value to the owner, but that the system of valuation adopted has been just and fair, and is, under the circumstances, in entire conformity with the law.

This case, therefore, involves the inquiry as to the basis or theory on which *ad valorem* duties are to be estimated, in all cases, upon champagne wine.

The law of 1863, under which you are proceeding, in effect punishes the entry of goods at the custom-house, or the attempt to enter them, by means of an invoice which shall not contain a true statement of the actual market value of the goods. It is alleged here, on the part of the plaintiff, that this

48 invoice did not contain a true statement of the market value of the goods, and on the side of the claimants it is alleged that it did.

The inquiry therefore presents itself—what is the market value of goods? What is the "actual market value," in the sense of that statute?

And before answering that question, in terms, it is well to look at the course of previous legislation. I may observe, in the first place, that, obviously, it must be in the highest degree desirable that a system of revenue laws for the collection of duties *ad valorem* should be, as far as may be, uniform in its operation, and that no invidious discrimination should be made between goods obtained by purchase and the goods of a producer or manufacturer. By the law of Congress of 1799 *ad valorem* duties were required to be estimated upon the cost of goods. This rule, when applied to the case of the purchaser,

49 appeared to, and in all ordinary cases did, give a very fair indication of the market value, for the purchaser is presumed to have purchased at the ordinary prices, at the ruling rates; and the prices actually paid by him, it was supposed, would in the majority of cases be equivalent or nearly equivalent to the actual market value. But when the same rule and mode of computation was applied to the manufacturer, and he was permitted to invoice his goods at the

actual cost, the amount which they had cost him to produce, the invoice value would necessarily be less than the market value or price—the price at which he would sell to purchasers. By the law of 1818, this inequality or want of uniformity was removed, and by that act, continued by subsequent legislation, and in force up to this time, the manufacturer, or he who obtains the goods otherwise than by purchase, was required to invoice them at the actual market value.

You will perceive that such a statute was necessary, for a moment's reflection must convince you that if the manufacturer is allowed to invoice his goods at the actual cost to himself, he will, in all cases, be enabled to invoice them at a much less value than any purchaser could who might have obtained the same or similar goods in the market. You will therefore observe that the legislation of Congress—the later legislation—has absolutely refused to allow the manufacturer, or him who obtains the goods otherwise than by purchase, to invoice such goods at their cost. They are, in all cases, required to invoice them at the actual, the real actual market value. Under these statutes, and it is presumed with a full knowledge of them, these claimants, or the consignor of the goods in this case, has invoiced his goods. He has declared to the consul that he has invoiced them at their actual market value. The question now arises before you, has he invoiced them at their actual market value, or has he invoiced them at a price far below their market value?

The market value of goods is the price at which the owner of the goods, or the producer, holds them for sale; the price at which they are freely offered in the market to all the world; such prices as dealers in the goods are willing to receive and purchasers are made to pay when the goods are bought and sold in the ordinary course of trade

That is, as nearly as I can define it, the market value, or the actual value, of goods, as contemplated in that statute. I am not aware that any definition of mine is necessary to explain to you words, the popular meaning of which precisely corresponds with their legal signification. You yourselves, without assistance from me, being men of business, can tell; you must be able to know and to form a correct and definite idea of what, in a statute of this kind, passed under such circumstances, the Congress of the United States meant by the actual or real market value of goods. You will perceive, therefore, that that actual market value of goods is the value on which duties are to be computed, and that the actual cost of the goods is not the standard. On the contrary, that having been the standard, the law has been changed, and for the standard of the cost has been substituted another standard, to wit, the actual market value.

The United States claim that they have shown that the actual market value of these goods is much greater than the prices at which they are invoiced.

The defence claim at least in their depositions, so far as I have been able to understand them, that the law is complied with if the goods are invoiced at their cost. The estimates of the cost of production are given, and the amount at which they are invoiced is within a fraction of the actual cost of the production of the goods. It is urged by the counsel for the claimants that the actual cost constitutes and must be taken as the market value, the actual market value of the goods; because he says no sales of these goods are made at Rheims, where the goods are produced. But the depositions presented by the defence, so far as I have been able to gather, solely refer to the actual cost of production, and the witnesses defend and vindicate the propriety, under the circumstances of this case, of taking the actual cost of production, and that alone, as the market value. He claims that there is no actual market value at Rheims, the place where the goods are produced, as determined by sales, and that the only way to arrive at the market value is to take the cost of production to

compute how much the manufacturer has actually disbursed in producing the goods, and you have the actual market value. The United States, however, maintain that though the manufacturer of these goods may not ordinarily sell them for consumption at Rheims, and though there may be no persons at that place who buy the goods for the purpose of disposing of them at that
55 place, yet they are freely offered to all the world, and held at known and established rates; that they are sold by the manufacturers to any one who may apply by letters addressed to them or their agents throughout Europe, and can be obtained, and only be obtained at certain fixed rates, at which they are held by the producers of the goods, and at which they are ready to furnish them to all the world. If this latter state of facts be true, then it is evident that the prices at which the producers so hold them are the market prices within the meaning of the statute, under any rational interpretation which can be given to it.

It will, at first sight, strike you as extraordinary that an article of this
56 kind, entering so largely into the consumption of mankind, an article which is consumed in great quantities by perhaps every civilized nation on the face of the globe, the value of the annual production of which is from five to ten millions of dollars, which is produced exclusively in a small district in France, the production being confined chiefly to a few towns in that district, where the manufacturers reside, it will at first strike you, I say, as very singular, if it be true, that such an article has no market value, I leave for you, gentlemen, to consider, without now adverting to any of the evidence in the case, how far it is probable that an article of that description can, in any just sense be said to have no market value. If it is not worthless, if it has a value, what is it? Has it really no market value? Are there no transactions in it?
57 Do or do not producers sell it in such quantities and at such rates as when known determine its market value? And we are driven, in this case, to compute the cost of production simply, and add a conjectural allowance for a mercantile profit, and take the amount so obtained as the equivalent of or substitute for the market value.

The United States, assuming the affirmative, have sought to establish the fact that there are sales of these goods; that they are offered to all the world; that the producers are willing to sell them at determined and fixed rates, well known to all.

They have sought to establish this by evidence of several kinds. The first, and I presume that most relied on, are the letters of Veuve Cliquot Pou-
58 sardin, offering to sell their goods to various persons These letters appear to be written in reply to an application for a sale. You have heard them read, and they seem to indicate at what price Veuve Cliquot Pousardin holds their goods, and on what terms they are willing to sell them.

The letters to which they reply are not produced, and I am asked to charge you to consider that circumstance. You may consider it, and assign to it such weight as you think it deserves. Of course, the value, as proof, of those offers on the part of Veuve Cliquot Pousardin to sell their wines, and of the indication of their prices conveyed in these letters, will depend upon whether or not you are satisfied that the offer was made by them in good faith, and that it was for a considerable quantity of the goods. From the intrinsic contents of the
59 letters you can estimate for yourselves whether there is any reasonable ground to doubt that in making these offers, or in communicating the prices to the supposed purchaser, (their correspondent,) they were or were not aware that the order was for any considerable quantity, and that the wine was intended for exportation. Such deductions as in candor and conscience you feel at liberty to make from the force and effect of the letters of Veuve Cliquot Pousardin, indicating their prices, and avowing their willingness to sell and deliver the goods, you will, of course, make.

And you are also to estimate what is the force of the fact that the owners themselves of these very goods, in reply to the supposed purchaser, states
60 their price and avows his readiness to sell and deliver these good, how far this is compatible with the assertion made, or the position taken on the part of the claimants, that there is really no market value to these goods.

The United States have also offered in evidence various prices current. These were obtained, I understand, from dealers in wines at Paris. Of course, gentlemen, if you believe that these merely indicate the retail prices of some grocer, or of some lager beer saloon, or some one who sells wine by the bottle, or the half bottle, or the drink, or even two or three bottles, they will be but slight guides to you in estimating the market value of wines at wholesale. On the other hand, if they appear to be statements of the prices at which
61 wines are held by dealers in Paris, a city which is within a few hours of Rheims, the place of production, then they do throw light on the market value of wines. I do not see how it can be otherwise. If the place of manufacture, the place where manufacturers congregated were at San José, surely the prices offered here at San Francisco for wines, or the prices demanded here, as indicated by the prices current, would be some guide to a candid man as to the market value of the goods at San José. I am unable to see why the testimony should be rejected. It is before you for your consideration, and I say again, that if you are satisfied it shows only the price of wine at retail, at small cabarets or drinking shops, it can afford but little assistance to us in determining the market value; but if, on the contrary, it discloses the prices
62 asked by agents who deliver, or offer to deliver the goods at Paris or at Rheims, or who transmit orders to their principals there, then it is like an offer by the principal himself.

The United States have also appealed, and so have the counsel for the claimants, to the prices which have been obtained for these particular wines in this country during a course of transactions extending over a period of seven years.

With regard to the question as to whether in the absence of any market value, strictly so called, the jury or the court would be justified in saying that the statute was complied with by allowing the producer to estimate the cost, and then add a mercantile profit, I conceive it hardly necessary to charge you.
I have looked in vain, and in this your own recollection will either
63 corroborate me or set me right, for any statement in the depositions of a mercantile profit, or an estimate of it. I repeat that I have not discovered in this testimony anywhere any design on the part of these gentlemen who testified abroad, and who maintain the rightfulness of the mode of valuation adopted in this case, any computation of or allowance for a mercantile profit to be added to the cost of production, to obtain that market value.

They aver that there is no market value of these wines at Rheims, and no mode of estimating or getting at the market value, or of complying with the statute, or of arriving at any substitute for the market value except by computing the actual cost. I have not seen anywhere in their testimony an
64 addition of twenty or twenty-five per cent., or of any sum whatever as the profit of the manufacturer of these articles. No allowance of any sum whatever, over and above the cost, is made to represent the profits, which the name and representation of the brands, and the vast capital engaged in the business, and the fact that from the value of the case these manufacturers have essentially the monopoly of the champagne market all over the world, would necessarily enable them to realize.

On the part of the claimant a large number of witnesses, most respectable, apparently, from their official positions, have testified that there is no market value for this wine at Rheims. It is for you to say whether they are not
65 totally mistaken, or, if they be not wholly mistaken, whether their mistakes have not arisen from a misconception of what is the market value

of wines. It is for you to say whether they mean anything more than that the manufacturers do not at Rheims deal in each other's wines. The statement made by them that there is no market value for champagne at Rheims must be taken by you with the explanations and qualifications with which it is given. It must be taken in connexion with the rest of their evidence, showing in what sense they mean to say that there is no market value for these wines in the champagne district. It must be taken also in connexion with the testimony offered by the United States, to show that there is a market value for
66 these wines, that is to say that these wines are held at and can be obtained by anybody for certain determined rates, below which they cannot be obtained, and which prices are much higher than are declared in this invoice.

With regard to the question of intent, I am asked to charge you that you should be convinced that these goods, if invoiced below their market value, were invoiced fraudulently below their market value. The previous statutes passed by Congress had introduced in many instances the word "fraudulently," had defined the offence to be making a false invoice "with intent to defraud" the revenue or evade the payment of duties.

This statute, apparently *ex industria*, omits these expressions and
67 substitutes the words, "If the owner, &c., shall knowingly make an entry by means of any false invoice," &c. I do not feel at liberty, where the legislature has left out the word "fraudulent" and inserted the word "knowingly," to reinstate the word "fraudulent." At the same time I am bound to say that I cannot conceive any case where an entry could be knowingly made by means of a false invoice, unless it were fraudulently made. I do not tell you in terms that you are obliged to find that the entry was made fraudulently; but you are obliged to find that it was made knowingly by means of a false invoice, and, for myself, I cannot imagine any case where it could be knowingly done without being fraudulently done. What, then,
68 shall we understand by this word "knowingly," as here employed? It is that in making out this invoice, and in swearing before the consul that such was the actual market value of the goods, Baron de Sachs, of Vino Cliquot Pousardin, knew better, and that he was swearing falsely. He forfeits these goods if you believe that he knew this invoice did not express their market value, their actual market value.

I think that I have referred in the course of my observations, somewhat desultory as they have been, to every point that is necessary for me to touch upon. By the legislation of the United States it is established that in revenue cases, where the government has shown probable cause, the *onus probandi*, or the burden of proof, is on the part of claimants to prove the facts neces-
69 sary to be shown in their defence. Under that rule of law, or rather provision of the statute, I am bound, at the request of the district attorney, to say that, in my opinion, the United States has proved probable cause, and it is for you to say whether the claimants themselves have made out their defence, whether they have shown that the goods were invoiced at their real market value at Rheims. I am not aware that I have omitted anything to which my attention has been called, and in relation to which I desire to charge in other terms than I have already done. Any instructions that have been asked for and not given, and which has been departed from in terms, the counsel on either side may consider as refused.

In conclusion, I invite your serious attention to this case. It is important, as must have already appeared to you, in that it involves a considerable amount of property, and it may affect, more or less, many other cases.
70 It is desirable, of course, that the laws of the United States should be vigorously and properly executed; it is also desirable that no injustice should be done to any foreigner or any person engaged in commercial transac-

tions among us. I invite your attention to this case as one of moment, and as such you will consider it. To you is committed a grave and important duty, which, I hope you will discharge with a full sense of your responsibilities.

And because the aforesaid exceptions so taken and made by the counsel for said claimant, to each and every of the said ruling and decisions of the said district judge, do not appear upon the record of the said trial; therefore, on the prayer of said claimants herein by his counsel, the said district judge hath to this bill of exceptions set his seal pending the said trial, and on this 29th day of August, A. D. 1865.

(Signed) OGDEN HOFFMAN, [L. S.]
Dist. Judge.
GEO. C. GORHAM, *Clerk.*

Marked: Filed Sept. 13, 1865.

Writ of error to district court.

71 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judge of the district court of the United States in and for the northern district of California, greeting:

Because in the record and proceedings, and also in the rendition of the judgment, of a plea which is in the said district court before you, between the United States, plaintiffs and defendants in error, and three hundred cases of champagne wine, marked "H. G. S & Co.," R. Fenerstein & Co., claimants and plaintiffs in error, a manifest error hath happened, to the great damage of said claimants, as by their complaint appears; and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the circuit court of the United States for the tenth judicial circuit, in and for the northern district of California, together with this writ, so that you can have the same at San Francisco, in the said northern district, on the first Monday of
72 October next, in the said circuit court, to be then and there held, that the record and proceedings aforesaid being inspected, the said circuit court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 8th day of September, A. D. 1865, and of the independence of the United States the 90th.

GEO. C. GORHAM,
[SEAL.] *Clerk cir. ct, U. S. 10th judicial circuit, North'n Dist. of Cal'a.*

Endorsed: Filed.

73 *Certificate clerk district court.*

UNITED STATES OF AMERICA, *Northern District of California, ss:*

I, George C. Gorham, clerk of the circuit court of the United States for the northern district of California, and ex-officio clerk of the district court of the United States, northern district aforesaid, do hereby certify that the papers annexed to this certificate, numbering seventy-five pages, contain a full, true, and correct transcript of the record in case of the United States *vs.* 300 cases champagne wine, marked H. G. S. & Co., made and certified to the circuit court of the United States, northern district of California, in obedience to writ of error hereto attached.

In witness whereof, I have hereto placed my hand and affixed the seal of said district court this thirteenth day of September, A. D. 1865.

GEO. C. GORHAM, *Cl'k*,
By DAN'L T. SULLIVAN, *Deputy*.

[SEAL.]
5 ct. U. S. R. S. cancelled.

74 *Judgment circuit court.*

Circuit Court of the United States, northern district of California.

300 BASKETS CHAMPAGNE mk'd H. G. S. & Co., &c., pl'ff in error,
vs.
THE UNITED STATES, def't in error.
} District court.—No. 182.

This cause came on to be heard at the June term, 1865, of this court, and after hearing counsel for the respective parties, it was ordered, pro forma, that judgment be entered affirming the judgment of the district court herein.

Wherefore, by reason of the law and of the premises, it is ordered, adjudged, and decreed that the judgment of the district court of the United States in and for the northern district of California, be, and the same is hereby, in all respects affirmed. And it is further ordered, adjudged and decreed that the said goods, wares, and merchandise mentioned and set forth in the libel in this cause be, and the same are accordingly, condemned as forfeited to the United
75 States. And it is further ordered, adjudged, and decreed that a summary judgment be, and the same is hereby, entered against Rudolph Fenerstein, principal, George H. Eggers and F. E. Vander Meden, sureties, for the sum of ten thousand five hundred dollars, lawful money of the United States, being the amount of the bond and stipulation given to the marshal on the attachment of the said 300 cases champagne wine, marked H. G. S. & Co., and that the said United States have execution to satisfy this judgment.

Entered this 13th day of October, A. D. 1865.

GEO. C. GORHAM, *Clerk*.

76 *Certificate.*

UNITED STATES OF AMERICA, *Northern District of California*:

I, George C. Gorham, clerk of the United States circuit court in and for the northern district of California, do hereby certify that the papers annexed to this certificate, numbering seventy-five pages, contain a full, true, and correct transcript of the record in the case therein named, made and certified to the Supreme Court of the United States in obedience to the writ of error hereto attached.

In witness whereof, I have hereunto placed my hand and affixed the seal of said circuit court, this 16th day of October, A. D. 1865.

[SEAL.] GEO. C. GORHAM, *Clerk*.

Filed December 4, 1865.

Supreme Court of the U. S.

THE UNITED STATES, DEFENDANTS IN ERROR,

vs.

300 BASKETS OF CHAMPAGNE, MARKED H. G. & CO., R. FENERSTEIN, CLAIMANT, PLAINTIFF IN ERROR.

Brief and Statement of Facts and Points of Law for the Plaintiff in Error.

D. B. EATON, *Of Counsel for Plaintiff in Error.*

New-York:
JOHN W. AMERMAN, LAW PRINTER,
No. 47 CEDAR STREET.

1866.

Supreme Court of the U. S.

THE UNITED STATES, DEFENDANTS IN ERROR,

vs.

300 BASKETS OF CHAMPAGNE, MARKED H. G & CO., R. FENERSTEIN, CLAIMANT, PLAINTIFF IN ERROR.

Brief and Statement of Facts and Points of Law for the Plaintiff in Error.

D. B. EATON, *Of Counsel for Plaintiffs in Error.*

New-York:
JOHN W. AMERMAN, LAW PRINTER,
No. 47 CEDAR STREET.

1865.

959

Supreme Court of the United States.

THE UNITED STATES, Def'ts in Error,

vs.

300 BASKETS OF CHAMPAGNE, marked H. G & Co., R. FENERSTEIN, Claimant, Plaintiff in Error.

BRIEF AND STATEMENT OF FACTS AND POINTS OF LAW FOR THE PLAINTIFF IN ERROR.

This case originated in a seizure by the Collector of the Port of San Francisco, on the 20th day of April, 1864, of 300 baskets.

The information filed against the same by the District Attorney of the Northern District of California recites the seizure and prays judgment of forfeiture. (Fols. 1 to 5.)

The information also asserts the following:

(1.) That on or about the 28th day of October, 1863, "one Baron F. de Sachs, being one of the owners of said "goods and merchandise," and intending to import the same into the United States, made and signed an invoice of the same, and produced the same "to the Consular Agent of the United States," &c., "with a declaration endorsed thereon, and signed "by the said owner, that "said invoice *contained the actual market value* of said "goods and merchandise, *at the time and place when and*

" *where the same were procured or manufactured*," and " that the Consular Agent then endorsed the certificate " required by law. (Fol. 2.)

(2.) That afterwards said owner shipped said merchandise at the port of Bordeaux, in France, " consigned to R. Fenerstein & Co., at San Francisco aforesaid," &c.

(3.) That afterwards, and about the 5th of April, 1864, " said goods and merchandise were imported into the " United States by the owner *aforesaid*," &c.; that they arrived in San Francisco by the Amand Rosé André, from Bordeaux. (Fol. 3.)

(4.) That afterwards, " said R. Fenerstein & Co, con- " signee, *by their attorney in fact*," F. Sievers, &c., " made " an entry of the same, at the office of the Collector of Cus- " toms of the port of San Francisco aforesaid, and on such " entry produced and left with said Collector the said in- " voice so made and produced to said Consular Agent, with " the said declaration of said owner, so as aforesaid endorsed " thereon, as the true and genuine invoice of said goods " and merchandise, and represented that the same, and " also said declaration endorsed thereon, were in all re- " spects true, and contained a true and full statement of " the actual market value of said goods and merchandise, " *at the time and place when and where the same were* " *procured or manufactured*." (Fols. 3 and 4.)

(5.) " That in truth and fact, the said invoice," &c., " and declaration," &c., " were and are false and fraudu- " lent, and did not state or contain a true and full state- " ment of the *actual market value* of said goods and mer- " chandise, *at the time and place when and where the same* " *were procured or manufactured*, but, on the contrary, " *said owner* well knew that said invoice was false, and " that the market value of said goods and merchandise " was much greater than the sums and prices stated in " said invoice." (Fol. 4.)

(6.) That said R. Fenerstein & Co., &c., and said F.

Sievers, &c., "well knew that said invoice and said de-"claration were false and fradulent." (Fol. 4.)

(7.) Then the information charges that "said owner "and consignee," &c., and "said F. Sievers did *know-*"*ingly* make an entry of said goods," &c., "by means of "a false invoice and a false certificate," &c., "so fraudu-"lently procured," &c., "and of an invoice that did not "contain a true statement," &c., "and of said false decla-"ration," &c., "with a fraudulent design to evade some "part of the duties lawfully chargeable thereon." (Fol. 4.)

Therefore, it is alleged that the goods are forfeited to the United States, &c., and process was prayed against parties in interest to appear, &c.

R. FENERSTEIN & Co., having appeared as claimant, put in an answer pleading the general issue, reserving exceptions, &c., to the libel. (Fols. 5 and 6.)

The case was tried in the District Court, before Judge Hoffman and a jury, and the verdict of the jury was that, "we, the jurors, find for the plaintiff." (Fol. 7.)

Judgment was entered on the verdict, 29th August, 1865, by which the champagne was declared "condemned and forfeited to the United States," &c., and a "summary judgment" was entered against said Rodolph Fenerstein, principal, and others, as sureties, for $10,500, "being the "amount of bond and stipulation given to the marshal," &c., and that the United States have execution, &c. (Fols. 9 and 10.)

The case was carried, by writ of error, to the Circuit Court, where the judgment of the District Court was, in all respects, affirmed. (Fols. 71 and 72.)

From the Circuit Court the case has been brought to this court by writ of error sued out by the claimant. (Fol. 1.)

The Bill of Exceptions appears from fols. 11 to 71.

It is therein stated:

(1.) That the claimant, Veuve Cliquot Pousardin, was, and had been for years, a manufacturer and dealer in champagne, at Rheims, in France, and that the wines in controversy were made by her firm at that place, (it does not appear *when*,) and were consigned by her firm, through H. G. Schmidt & Co., of New-York, to their agents, R. Fenerstein & Co., at San Francisco, for sale, and that said wines came *via* Bordeaux, and from that port, in a French vessel, in November, 1863, and arrived in San Francisco April 4, 1864. (Fols. 12 and 13.)

(2.) That said Veuve Cliquot, prior to shipping the wines, and on the 28th October, 1863, made and presented to the United States Consular Agent at Rheims, an invoice thereof, dated Rheims, October 28, 1863, of which a translation appears at fols. 14 and 15.

It will be seen that the value of the bottles and the expense for commissions, shipping, &c., are added to the value of the wine. (Fol. 15.)

And at the time of making the invoice one of the owners made and subscribed the oath required by the act of Congress of March 3d, 1863, and at the same time declared that the wine was designed for entry at the port of San Francisco, and said invoice and declaration thereon were forwarded to H. G. Schmidt & Co., of New-York. (Fols. 15 and 16.)

(3.) That "in April, 1864, said R. Fenerstein & Co., "by Sievers, their agent, attorney in fact, presented said "invoice at the office of the Collector of Customs of San "Francisco," and together with a bill of lading of said goods, and demanded an entry, &c., "and thereupon said "Sievers took and subscribed the consignee's oath," &c., and said goods were entered at "the prices stated in said invoice." (Fols. 15 and 16.)

(4.) The plaintiff below then called W. B. Farwell as a witness, who stated that he was the United States Naval

Officer at San Francisco; that, as such, he visited Paris in the year 1864, *but not Rheims at any time*, and that he is not a manufacturer of, or dealer in, champagne, nor an *expert* as to the price thereof; and that he remained in Europe three months, having gone there to ascertain the price of champagne wines. (Fols. 16, 17 and 18.)

I. *First Exception.*—The same witness then proceeded to say that he inquired at "several agencies in Paris," &c., "for champagne at *wholesale*, for exportation, and "the agents *uniformly stated to him their prices*," &c. (Fol. 18.)

Here, it appears that the *wholesale* Paris prices were distinctly stated to the witness, yet he does not voluntarily give them, nor does the learned District Attorney seem to have thought it prudent to ask them. They might have appeared to be scarcely higher than the invoice wholesale prices given, of the wines sought to be forfeited; whereas, if only retail prices of the best wines in Paris are placed before the court, a great disparity of price is apparent.

The very next sentence of this prudent witness illustrates this adroit and euphonious ignoring of all wholesale prices, even at Paris. He says: "That among other "wine-dealers in Paris, (of course he selected the most "fashionable and expensive,) was the house No. 6 Pro-"vence-street, on the outside of which was a sign, E. "Delouze, Royot de la Maison, Minet, Jeune & Co., "Rheims. That he called at said establishment, and "was shown by the proprietor samples of various wines, "*who stated their wholesale prices;* that he was also "handed *a* printed prices current, which he now pro-"duced." (Fols. 17 and 18.)

The omission to state that this price current contained *wholesale* prices appears to be *studied and adroit.* The objection is distinctly placed on the ground that *wholesale* prices are not called for, yet the learned District Attorney omitted to ask for such prices. (Fol. 17 and 18.)

There is nothing whatever to indicate that the house last referred to, or its wines, had any relation whatever

to, or connection with, the wines or house of the claimant, or Veuve Cliquot Pousardin, or with Rheims even, except that the name, Rheims, appeared on the sign. It may perhaps be that to that fortunate circumstance, and to the splendor and fashionable location of his establishment, Monsieur Delouze was indebted to this pleasant call from the worthy Naval Officer during one of his afternoon promenades, which, we may well believe, must have been vastly more pleasant than a real business visit to the dull warehouses or dirty wine vats of provincial Rheims, where alone, however, something reliable, pertinent and just might have been learned concerning the "actual market value, at the time and place of shipment "or manufacture," of the wine sought to be forfeited.

Inasmuch however, as the counsel for the Government had nothing else prudent to offer, and nothing would avail more, if received, than this Paris retail price current of select, fashionable wines, it was offered in evidence. It was objected to the testimony, as follows:

(1.) That it was hearsay.

(2.) That it was immaterial and irrelevant.

(3.) That it did not purport to give wholesale value, or even *prices*, for any purpose, but only *retail prices of single bottles at Paris.*

(4.) That it did not appear that any sales were based on such price current, or that the price current was based on any sale, or that the paper sustained any relation whatever to any real transaction in the articles therein named.

5.) That it did not appear that the paper had any connection or relation with the claimant.

(6.) That it did not appear that the wines named in the paper were either of the *same kind*, or of the *same quality*, as those in controversy. (Fol. 18.)

A translation of the paper appears in the record, (at fol. 19,) and it should be noted:

(1.) That the prices are by the bottle, and not per

basket; that is, retail, and not wholesale prices are given.

That makes the omission (already noticed) of the witness to state that *this* price current is the same as that which gives the wholesale price for the English market the more important, and shows that such could not have been the fact.

(2.) That this paper is confined exclusively to "*fine* wines."

The great disparity in price between the wholesale and retail prices of champagne, and between a "fine" and the average article, is well known.

A moment's inspection of the paper shows that it relates only to the retail rates of a gay, fashionable Paris café; the resort of dandies, epicures and sluggards, (always excepting those shrewd Americans, like the Naval Officer, who go there for a purpose;) and that its prices can have no legal or natural relation to the wholesale basket market value of the common wines of exportation a hundreds of miles away, at Rheims.

The paper opens with what clearly shows that sales are made "only from 2 to 6 o'clock;" not too early to interfere with its customers' toilets, nor too late to dress for the opera or "*La Mabille.*"

One class is headed:

"Fine Champagnes, *carte d'or.*"

The other:

"*Gold Spangled* Champagnes." "*Patented.*"

They doubtless would compare with the plain articles of general commerce, sought to be forfeited, as a Hotel in San Francisco with the *Hotel du Louvre*, or as San Francisco with Paris.

NOTE.—It was then proved that the witness had not made *any purchase of champagne wine, while in France.* (Fol. 20.

II. *Second Exception.*—This exception arises on a question at fols. 20 and 21.

The counsel for the Government seems to have had an impression, or to have been troubled by a theory, that Paris prices, (whether wholesale or retail,) if they could be given in evidence at all, might be thought to need some testimony to accompany them, tending to show the relation they bore to prices at Rheims, and he, therefore, attempted to show that relation.

It cannot be doubted that the sagacity which formed this theory, also caused him to be duly impressed with the importance (if he could show nothing of the price at either Paris or Rheims, of the claimant's wines) of showing, at least, the relative prices, at Rheims and Paris, of *some* of the wines mentioned in one or the other of his prices current.

For if he could do that, and could also be indulged, in this particular, in the general latitude and freedom as to the admissibility of testimony, elsewhere sanctioned by the learned District Judge, he could *argue back and forward*, all to the effect that the difference in Paris and Rheims price of champagne in controversy was *very likely, at least just as likely as otherwise*, the same as was illustrated, in respect to the particular kind of wines, concerning which he had made some proof. There would, at any rate, be but two objections to this (alleged) syllogistic method of establishing what should be proved, which would be—

(1.) That there is no natural or logical relation between the several kinds and brands of champagne, such as to warrant the inference that there was only the same disparity of prices in the two places, as to the one, as there was as to the other.

(2.) That there is *no proof* whatever any where, of the price or value of any kind or quality of wine at Rheims, except that given in the claimant's invoice, as to his own wine.

And when the learned counsel attempted to make his proof on his own theory, he wholly failed; because the worthy Naval Officer had wholly omitted to ascertain any fact, or even to bring any price current relating to the relative price, at the two cities, of any of the kinds or quality of wines mentioned in the prices current in evidence, or of the relative prices, in those cities, of the wines in controversy.

Hence a new kind and quality of wines were resorted to for the comparison deemed necessary. The wines selected for that purpose were "Mumm's Champagne," and "Moet & Chandon Champagne." (Fols. 21 and 22.)

This evidence was objected to, because the inquiry was irrelevant and immaterial; because the testimony, if given, would be hearsay, and because the champagne referred to in the question was of a different kind, price and quality from that in controversy.

The objections were overruled, exception was taken, and the witness stated what he *had learned* at Paris, "what he was informed by *some of the wine-dealers of Paris*," &c., as to the difference in prices, and as to the prices of the two kinds of wines at Paris and Rheims. (Fols. 21 and 22.)

We claim in regard to this question:

(1.) The answer would be mere hearsay testimony, and that the answer would be and is open to every objection, substantial and technical, which can apply to any such testimony.

It does not appear of whom, or when, or even in what part of Paris the report he is allowed to relate was heard.

(2.) The only legitimate object of the testimony, if admissible, must be to show that if the difference in price

between Moet & Chandon wine, or Mumm's wine, at Paris and at Rheims, is any given per cent., that therefore only the same difference exists as to that quality of Eugene Cliquot's wine now in controversy. We submit the inference is unwarranted and the conclusion not legitimate. These two selected wines might have been of the first quality, of which but a small amount was made, and that especially for the fashionable cafés of Paris; and in that event the market of Rheims could hardly be much below that of Paris. The facts might be very different as to other wines, such as those made especially for the English, Russian or American markets.

The evidence was designed to, and doubtless did, have the effect of causing the jury to think that they might assume the market of Paris and that of Rheims, as to champagnes generally, to be about equal.

From this basis, and especially without legitimate proof, they were induced to take the unwarranted step to a verdict, viz.: *that all champagnes were nearly of a value, and hence, that from the rates given in prices current, they might conclude that the valuations in the invoice in controversy were too low, and therefore fraudulent.* Short of this argumentative process, all the testimony of the Naval Officer is wholly irrelevant.

(3.) It may be stated generally, if the theory of foreign evidence on which this case has been tried, that it supersedes the necessity of producing witnesses for examination or cross-examination; that it relieves litigants of the trouble and expense of sending commissions to foreign countries as has heretofore been customary; that it avoids the labor and trouble of looking up persons who are experts in peculiar occupations, or who have personal knowledge of facts. All that need be done is to send some official abroad or solicit the services of some needy tourist, who can, with little trouble and without departing from the places of fashionable resort, note in his diary the hearsay of hotels and cafés, and fill his portfolio with bills

of fare and prices current, touching, as near as may be prudent and convenient, the matters, places and times in controversy; and then, when any litigation arises, no preparation is needed, but a perusal of the diary and selections to match from the portfolio.

If this compendious and agreeable system of evidence be sanctioned in this court, the next case that comes up will, doubtless, demand the only possible improvement upon it; which would be, that such extracts from said diaries and portfolios shall be treated as *conclusive evidence* of the forfeiture charged. In this case the court has only adjudged them to prove a *probable cause*, that is, to be *prima facie* evidence!

It is not to be expected that the court will ever be asked that such rumors and bills of fare may be read from "Murray's" or "Appleton's Guide Book," as that would wholly supersede the *necessity* of a "Three months' "Official Champagne Tour in Paris."

Request to instruct Jury.

1*st Request.*—(Fol. 35.)—It is submitted that this request is correct, and its refusal error, and the exception well taken, under the legal rules and principles already referred to.

If an individual offer can in any case be taken as evidence of a general market value, it can be only in a case where the jury has reason to be satisfied that the person making it would, in the course of trade, sell at such rate. The fact of his being unwilling generally to sell at such rate, would require the offer to be treated as no evidence of the general market rate, but as an offer dictated by some specific reasons.

2*d Request.*—(Fol. 36.)—The questions raised by this request, and the exception founded on its refusal, have in theory already been made the subject of remark. To overrule the exception would be to disregard the positive language of the statute. It requires that reference shall

be had to market value "*at the place*, &c., of manufacture;" and not at a place a hundred of miles away.

Had it been shown that the Paris value was the same as that at Rheims, then the exception might not be available; but in the absence of such proof, and of any proof showing that values were even approximately the same, the exception is as good as it would be if the article in controversy had been Port wine, and the places in question had been Oporto and St. Petersburgh.

The theory of the judge, that the market value at Paris tended to show the market value at Rheims, is not admissible. The market value of Rheims was a proper and possible subject of direct proof, from some one acquainted with buying and selling of wine at Rheims.

5th Request.—(Fol. 39.)—This request, as relating to market value, may be discussed in this connection: It is not easy to see on what ground of law or justice the learned judge refused this request. The request, it will be observed, does not raise any inquiry as to what is meant by a market value. It does not ask the court to tell the jury what a market value is generally, or even under very peculiar circumstances. What it asks is this: In view of the question raised before the jury, as to there really being "an actual market value" at Rheims for the wine in question in 1863, it was necessary to give them instructions to apply, in the event that the jury should find that there was no such market value; and therefore the request states a rule *for that event*. We claim that this rule was necessary, and is the true one.

The statute says, the invoice must give the "actual market value at the place," &c., of the article invoiced. Now suppose, (as this request did,) there was no such market value by reason of its being the *first of the article ever made at or near the place;* (certainly a very possible event, and such was the fact in the case of the importation of the great Boston organ, and of the importation of the celebrated Cambridge telescope;) what is to be the guide or rule in making the invoice? An unknown and impossible standard, in the contingency of there being no

actual market value, is laid down in the statute. What does the spirit and intent of the law require? Will the courts lay down no rule, and leave the honest manufacturer to the tender mercies of the custom-house official? Is there, in the nature of the case, any other rule that can be laid down in such contingency but the one stated in the request? It cannot be said that a profit must be added to the actual cost, for there is so far from any reason to think that such additional amount is or probably would be the actual market or other value, (if there shall ever be any market value at all,) that there is, from the nature of the case supposed, no proof at all that the article is or ever would be worth in market even half its actual cost.

It cannot be replied that champagne is a well-known article, long in market, and therefore *must have had and be presumed to have had a market value at Rheims; for whether there was such a market value was the very matter at issue before the jury to decide, and in which it appears from the record there was evidence pro and con. before them, and the instruction was necessary in case, on that issue, the jury should find with the claimant.*

Let us suppose, (what may have been the fact,) that the jury did find that issue for the claimant, viz., that the wine in question had no "actual market value" at Rheims, when the invoice was made; and further, that it was invoiced at cost, *then the whole verdict would depend on the ruling on this single request: "Was the "manufacturer guilty of fraud or not* in invoicing the "wine at cost, in case there was no actual market value "for it at Rheims, at the date of the invoice?" It is, therefore, a question on which this court is called upon to express its opinion.

This reasoning will appear more forcible from some reference to the language of the charge:

(1.) The judge expressly refused to charge on the subject of this fifth request. He says, "with regard to that ques- "tion, as to whether, in the *absence of any market value* "strictly so called, the jury," &c., "would be justified

" in finding that the statute was complied with by allow-
" ing the producer to estimate the cost," &c., " I conceive
" *it hardly necessary to charge you.*" *And he did not charge on that point at all.* (See fols. 62 and 63.)

Yet he expressly admits that there was a *question of fact* before the jury on this very important point of this request, (namely, whether there was a market value of the wine in question at Rheims,) and uses this language, viz.: " On the part of the claimants, gentlemen, a large
" number of witnesses, most respectable, apparently from
" their official positions, have testified that *there is no*
" *market for this wine at Rheims.* It is for you to say
" whether they are not totally mistaken, whether their mis-
" take has not arisen from a misconception of what is the
" market value of the wines," &c., &c. (Fols. 64 and 65.) And immediately after he adds, referring to the same testimony, "it must be taken in connection with the testi-
" mony offered by the United States to show that *there is*
" *a market value for these wines*," &c. (Fols. 65 and 66.)

This distinct issue of fact is also clearly stated at fols. 54 and 55. Yet at the end of fol. 62, and also at fol. 69, he refuses all instruction on the point. And finally says, that when requests to charge have " been departed
" from *in terms*, the counsel on either side *may consider*
" *them as refused.*" (Fol. 69.) The counsel for the claimants does so consider.

How could the judge properly refuse all instruction as to the rule of valuation in the invoice, in case the jury found that well defined issue on the subject of " a market value" for the claimant? Was it any more clearly the duty of the jury to say whether the witnesses were mistaken, than it was the duty of the judge to say whether the claimant's counsel was mistaken in his prayer for instructions?

What adds importance to this refusal is, that it relates to the question of the intent and motive, whether fraudulent or not, of a most respectable foreign merchant, in his first effort to conform to a new and peculiar law of the United States, in respect of which he may naturally have felt much embarrassment. The long established rule has been, that no goods can be forfeited for any error, untruth

or defect in an invoice, unless the same was the result of a *fraudulent intent.* Now this request for instructions goes to the very foundation of the alleged fraudulent intent. If Baron Fde Sachs believed he might fairly make the invoice as he did, or believed that there was no market value for champagne in Rheims; or if, in fact, there was no such market value, then no fraud can be predicated of the transaction. Yet the judge sternly refused all instructions to guide either the jury or the honest foreign merchant in the contingency referred to.

Law of Evidence.

The principles of the law of evidence, by reason of which it is claimed the foregoing exceptions are well taken, are familiar and easily stated.

It may be said in the outset, in regard to all the exceptions to testimony, that a general objection to the admissibility of testimony is always good where the objection could not have been obviated at the trial, had specific objections been pointed out.

Merritt *vs.* Sherman, 6 *N. Y.* (2 *Sel.*) *R.* 168.

1. The best evidence should be given of which the nature of the case will permit and it is practical to obtain. This rule is well stated by Mr. Justice Nelson, in Clifton *vs.* United States, 4 *How. R.* 247. He says:

"One of the general rules of evidence of universal application is, that the best evidence of disputed facts "must be produced of which the nature of the case will "admit. The meaning of the rule is not that courts require the strongest possible assurance of the matter in "question, but that no evidence shall be admitted, "which, from the nature of the case, supposes still greater "evidence behind in the parties possession *or power*, be- "cause the absence of the primary testimony *raises a* "*presumption* that if produced it would give a complexion, at least unfavorable, if not directly adverse, to "the interests of the party."

This rule applied to the case would not permit proof by letter or by Paris prices current, at least unless it was first shown that there was no market value at Rheims, and no person could be found who knew prices there, by whose oath the market value at that place could be proved.

2. To the same effect is the rule as to hearsay evidence:

"Second-hand or hearsay evidence is used in refer-
"ence to that which is written as well as to that which
"is spoken; and, in its legal sense, it denotes that kind
"of evidence which *does not derive its value solely*
"*from the credit to be given to the witness himself,*
"*but rests also in part on the veracity and competency*
"*of some other person.* Hearsay evidence, as thus de-
"fined, is uniformly held incompetent to establish any
"*specific fact which in its nature* is susceptible of being
"proved by witnesses who can speak from their own
"knowledge."

1 *Greenleaf's Ev.* § 99.

Could not the value of wines at Rheims have been proved under a commission sent there, in which experienced merchants could have sworn as to the "*specific fact*" of the value of champagne, at the date of the invoice, had the Government preferred that method to a "Three months' Champagne tour in Paris?" How much of the testimony objected to rests on the credit to be given to Mr. Naval Officer Farwell? Does not his whole story rest "on the veracity and competency" of some other person, (and who but himself knows what person?) who gave him the prices current, and the general rumors on which his whole story rests? On whose veracity do the letters rest, to the truth of which no one has made oath?

See, also, 1 *Starkie Ev.*, pl. 2, § 55, pp. 180, 181.

The general rule is also laid down to the same effect in

Morris *vs.* Lessee, &c., 7 *Peters' R.* 554.

This last case states the exceptions to the general rule, which are historical facts of general notoriety, &c., &c., but even these cannot be proved by hearsay, or by an author's writing during the lifetime of those who lived cotemporaneously with the events to be proved.

There are also exceptions in favor of official certificates, records and public documents; but then it must appear that they were made or kept by those whose official duty it was to make and preserve them faithfully.

Their admission rests on the legal presumption that official duty has been performed.

1 *Greenleaf's Evid.* §§ 491, 497.

3. But it may be said that prices current are admitted in evidence. This is not denied, nor is it necessary to determine with any accuracy the conditions precedent to these admissions; for the terms of their admission in the present case were without any of the limitations uniformly insisted upon by the courts. It must at least appear, before a "price current" can be read in evidence, (1.) That dealers in the articles therein referred to are in the habit of giving credence to such "price current." (2.) That it is generally understood and admitted to be a report of actual transactions and real prices. In this case nothing of the kind appears. For aught that is stated, no such paper was ever before printed; no one relies upon it; no transactions are represented by it; and the paper might have been printed in the 16th century at London, or in the 17th at Canton, or in the 18th at San Francisco, without conflicting with any part of the testimony.

So, too, where a defendant was first proved to have been in the habit of correcting the prices current of a newspaper, they were allowed to be read against him.

Henkle *vs.* Smith, 21 *Ill. R.* 238.

But general advertisements in newspapers cannot be read in evidence.

Sweet *vs.* Avount, 2 *Bay R.* 192.

The English courts will not allow so well known and authoritative a work as "Lloyd's Register of Shipping" to be read in evidence. Per Lord Denman.

Freeman *vs.* Baker, 5 *Carr. & Payne*, 475.

Nor is a standard scientific book, such as "*Youat on the Horse*," admissible to be read in evidence. (Harris *vs.* The Panama R. Co., 3 *Bosworth N. Y. Rep.* 7. And see, to a similar effect, Commonwealth *vs.* Wilson, 1 *Gray (Mass.) R.* 337. Melvin *vs.* Eartly, 1 *Jones N. C. R.* 386. Launing *vs.* The State, 1 *Chandler (Wis.) R.* 264.)

The highest court in the State of New-York, in 1865, held that recitals of facts in a public statute are only *prima facie* evidence of facts between individuals, and that such recitals in private statutes are not evidence at all. It was doubted whether a historical work could be read in the lifetime of its author, and it was held that a local history (as of a county) is not admissible in evidence at any time. Only public and general histories are admissible.

McKinnon *vs.* Bliss, 21 *N. York R.* 206.

And this court has not been disposed to extend the common law rules of evidence in favor of hearsay and unsworn papers.

It has been decided, that though official "Army Registers," which are delivered to the departments, and contain the army regulations, may be read as evidence "of "facts strictly, that they may contain, &c., yet they can- "not be read to prove the pay or emoluments of officers, "&c."

Wetmore *vs.* The United States, 10 *Pet. R.* 647.

4. But there are certain cases which at first view may seem to lend some sanction to the ruling of the learned judge. Such as—

Wood *vs.* The United States, 10 *Pet. R.* 342.

In this case *other invoices* than the one in controversy were allowed to be read in evidence against the claimant.

But they were other invoices of the *same claimant*, and were introduced to show fraud. The question was wholly different from one of mere market value. Besides, the letters or prices current read in this case were papers with which the claimant had no relations and nothing to do.

See pp. 356, 358, 360, 361 of 16 *Pet. R.*

The court recognised such methods of proving fraud "as exceptions to the general rule." (P. 360.) Yet the exception is limited to other doings of *the party* "of a kindred nature," &c. (P. 360.) It does not make any and every paper a public officer may pick up or have given to him in one of the Café's of Paris evidence against a claimant on a question of actual market value. To the same effect as the last case, and upon the same theory, is the case of Taylor *vs.* The United States, 3 *How. R.* 197. It was only the *same* owner's papers in other matters, and to prove fraud, that were allowed to be given in evidence. The foundation and limitations of the rules of evidence as to market value are discussed in Clark *vs.* Baird, 9 *N. Y.* (5 *Sel.*) *Rep.* 183.

5. The jury should have been instructed that they could not consider, in coming to their verdict, the market value elsewhere than at Rheims, unless they were first satisfied there was no market value at Rheims. This is the most favorable ruling the Government could ask.

Gregory *vs.* McDowell, 8 *Wend. R.* 435.
Dana *vs.* Fielder, 12 *New-York R.* 40.
Wemple *vs.* Stewart, 22 *Barb. N. Y. Rep.* 154.
Haines *vs.* Haight, 14 " " " 76.
Harris *vs.* The Panama R. Co., 3 *Bosworth N. Y. Rep.* 7.

The case of Alfonso *vs.* U. S. (2 *Summer's R.* 421) only shows that the Government might have found competent witnesses in this country instead of resorting to letters and unauthenticated prices current; and hence the proof allowed is all the more clearly a violation of the fundamental and familiar rules of evidence.

Even if there were any doubt, at common law, as to the right to resort to other places for market values than the place in question, there could hardly be any under the statute of 1863. No language can be more unequivocal and imperative in making the market value at Rheims, the place of manufacture, the standard. On what theory then can the Government go elsewhere for that standard; at least before it has proved that there is no such standard at Rheims, or that the value at the place resorted to is the same as at Rheims?

The claimants maintain that if there was no actual market value at Rheims, one of these two results must follow:

(1.) That the cost of the champagne (by way of analogy to the rule under the older revenue laws) at Rheims must be taken as the standard; or,

(2.) That there is no standard, and hence no liability to forfeiture.

But to resort to sharp technical construction and far-fetched inferences, to condemn the property of foreign merchants, who at worst have only made a blunder in construing one of our new revenue laws, is not more unworthy of the dignity and magnanimity of the Government, than it is prejudicial to the best interests of commerce and incompatible with well-established legal principles.

At this stage of the case the claimant introduced some evidence having a tendency to show that champagne wine in the champagne district of France, in its manufactured state, ready for consumption, had not a fixed actual market value, and was not sold and dealt in at the place of production. (Fol. 22.)

The United States, to rebut this testimony, and also to prove such wines "are held for sale at current and fixed "rates and prices," &c., proceeded to offer some other proof, which was also the subject of an exception by the claimant, as will hereafter appear.

This evidence is as follows:

(1.) It was "proved that V. Ch. Farre was a manufac-
"turer in champagne wines at Rheims;" and thereupon, without further proof, "offered in evidence a letter from "V. Ch. Farre to Leuchtenroth, dated Rheims, 5th Nov., "1863."

Like proof was made in regard to Heidsieck & Co., and a letter from Heidsieck & Co. to Amos Hill, dated Rheims, April 28, 1864, was offered in evidence. (Fols. 23 and 24.)

Similar proof was made in regard to the alleged contents of other letters, being seven in all, and the dates, extending over the period from 27th October, 1863, to the 12th of May, 1864. They were addressed by and to several different persons. One of the letters is from Eugene Cliquot, (but it is "admitted that Eugene Cli-
"quot had no connection with the firm Veuve Cliquot "Pousardier," the owners of the wines in controversy in this case, see fol. 12) and all the letters were offered in evidence to make proof of the matters heretofore stated. (Fols. 24 to 26.)

The counsel for the United States also offered said letters in evidence "to show, among other things, the market "value of the *wines referred to in said letters, with a "view to show, by comparison of quality and selling "prices, the market value* of the Veuve Cliquot Pousardier champagne." (Fols. 24 and 25.)

The introduction of each or all of the letters, for any of the above-named purposes, was severally objected to by the claimant's counsel, and for the following, among other, reasons:

(1.) As being immaterial.
(2.) As being irrelevant.
(3.) As being *res enter alias acta.*
(4.) As relating to different kind and quality of wines from those in controversy.
(5.) As being letters not admissible under the pleadings.

(6.) Because no actual purchases of champagne had been proved, to which said letters could relate.

(7.) Because the pretended letters to which it was claimed these letters were replies, were not offered in evidence, nor was it pretended they were to be so offered. (Fol. 24.)

The objections were severally overruled by the learned District Judge, and he declared the letters competent and admissible "for the purpose for which they were "offered by the plaintiffs' counsel." (Fol. 25.)

Exception was taken to those rulings by the claimant's counsel, and the several letters were then read to the jury. (Fol. 26.)

No proof of handwriting or signature, or other evidence, as to the letters, was made, but there was an admission as to some of them, (but not as to all,) in this language: "its genuineness being admitted." (Fol. 23.)

The letters are to be found at folios 26 to 35.

It will be seen, by looking into these letters, that they give prices, (generally by the bottle,) of various wines, without any means of determining their relative value, as compared with the wines in controversy; that none of the letters are from any person in any way connected with the claimant, or owners of the wines in controversy; that several of the letters do not even refer to wines of the kind or quality of any of those mentioned in either of the prices current; and none of them make any statement as to the value of the only wines of which value was material to the issue.

This evidence could hardly have failed to have greatly influenced the minds of the jury, as it gives (pretended) prices of champagne at Rheims far above those stated in the invoice in controversy, and would tend to the conclusion that it was fraudulently made.

There is an objection to one of those letters which it seemed to us there can be no attempt to answer. It arises as follows:

(1.) It is admitted that Eugene Cliquot has no connec-

tion with the claimants, or rather with the owners whom the claimants represent. (Fols. 34, 12, 15.)

(2.) That each letter was separately objected to. (Fols. 24, 25.)

(3.) That Eugene Cliquot's alleged letter of the 27th October, 1863, to E. Leuchtenroth, *was not admitted* to be a genuine letter. (Fol. 23.)

Upon what possible theory could such a pretended letter have been received? There was no proof of handwriting or of genuineness.

It is submitted that the reception of those letters violated the fundamental and well-established rules in regard to the admissibility of evidence. It is almost impossible to imagine that those letters could be admissible for any purpose whatever, other than to prove that such letters were written. There was no such issue. The only issues were, whether the invoice in controversy was made in good faith; and in regard to the wine in controversy, what was "the actual market value thereof at "the time and place when and where the same was pro- "cured or manufactured."

The invoice in controversy is dated the 28th October, 1863. The following may be stated as some of the reasons why those letters should have been excluded:

(1.) The best evidence that is available should be required.

The real questions, as to the market value, stated in the most general and favorable form to the Government, were, was there a market value for wines in Rheims, in and about October, 1863, and if so, what was that market value? The best, as well as the most natural and usual proof, would have been obtained by examining, under oath, parties there resident, and engaged in buying and selling wine, by sending a commission for that purpose. Even under such a commission the letters of the witnesses could not have been introduced, unless on cross-examination, by way of contradiction, or as affecting credibility.

(2.) Unless it had been proved that there was no market value of the wines in controversy at Rheims, no questions could properly be asked as to the value of other wines; and even in that case, letters could not be read, as was allowed here, written by any one at Rheims, to any one and every one in other parts of the world.

(3.) We have seen that one letter, dated May 12th, 1864, was allowed to be read. This was error upon the general principles of the law of evidence, and all the more clearly so under a statute which makes the issue the value, at *the date of the* invoice, October 28th, 1863. Here was a period of seven months, within which many of the great staple articles of the world—cotton, silk, sugar, wines—on both sides of the Atlantic experience great fluctuations of price. Yet this letter of Eugene Cliquot, (dated May 12th, 1864,) containing the price, per bottle, of a particular kind of wines at Rheims, on that day, was allowed to be read, and to be received by a jury, without qualification, as a guide in deciding whether an invoice of a different kind of wine, made seven months before, was made with intent to defraud the United States.

It should be observed that no proof was offered tending to show that prices had not changed during these seven months.

(4.) The established rules of evidence, as well as the express language of the statute of 1863, already quoted, makes the test the "actual *market* value," whereas, the theory which admitted these letters ignores the market value altogether, and substitutes what this and that person has written to some stranger he would sell for, at a private sale.

(5.) It is no answer to any part of this reasoning to say, that one of the questions in controversy was, whether there was a market, or any market value at Rheims; for, upon that question, as upon all others, the rules of evidence herein invoked apply. The proper and legal

proof would be by examination of persons familiar with buying and selling at Rheims, whether there was a market, or public or general purchasing and selling of wines at Rheims; or, perhaps, by asking the more general question, "what are the facts, as to there being a wine market, or market value of wine at Rheims?" Surely the proof could not be made by reading any or every genuine letter that any wine manufacturer at Rheims had written during the last few years, to any part of the world.

Even had a commission been sent to examine Eugene Cliquot on oath, upon questions involved, as to markets or market value, it would not have been sufficient to prove preliminary that he was a wine manufacturer. It would need to be first proved that he had such experience that he would be likely to know about a market, if there was one, at Rheims. The authors of those letters might have merely manufactured on shares, or for owners of vineyards, and have known little or nothing of the market.

(6.) The theory of the law of evidence, and on which these letters were received in evidence, must have been simply this: that when the question is, whether there is a market for an article, or a market price therefor, and what the same is at a specific time and in a given city, in a foreign country, the facts relative thereto may be proved *by reading in evidence whatever any manufacturer of the article referred to has written on the subject at any time, within about a year of the date in question, to any body else in any part of the world;* and that this may be done *when all the letters, to which those read are responses, are deliberately withheld.*

It is for this court to declare whether such ever has been or is now the law.

(7.) That the market prices at Paris were placed before the jury without the proper limitations, and without discriminating between retail and wholesale prices; and

that the letters were allowed to be treated by the jury as legitimate proof of market value at Rheims, and of the other facts for which they were offered, clearly appear from the charge of the judge to the jury. He says, after referring to the statute of 1863, "the inquiry, therefore, "presents itself, what is the 'actual market value, in the "sense of the statute?'" * * * "The market value "of goods is the price at which the owner of the goods or "the producer furnishes them for sale; the price at which "they are freely offered in market to all the world," &c. * * * (Fol. 51.)

"You will perceive, therefore, that the actual market "value of the goods is the value on which goods are to "be computed," &c.

Again: "The letters appear to be written in reply to "an application for a sale. You have heard them read, "and they *seem to indicate at what price the claimant "holds his goods, and on what terms he is willing to sell "them.*" (Fol. 58.)

"Again, speaking of the prices current: "They were "obtained, I understand, from wine dealers in Paris." He then says, if they only relate to "some grocer, lager "bier saloon, or if you believe they only indicate *retail* "prices," &c., "they will be *but slight guides to you in "estimating the market value of wines at wholesale.*" (Fols. 60 and 61.)

They should have been wholly excluded, if they related to wholesale prices. Had they been beer-shop, lager saloon retail prices, they would have been far less objectionable than being (what they really were) the prices of the most elegant, fashionable and expensive *cafés* in Paris. The agent of the Government was interested in persuading the jury to believe wines were as high as possible at Rheims. Why did the judge use such caution to guard the jury against the *low* rates of the common resorts of laborers and hackmen, who drink cheap wines, and not utter one word of caution in respect to the high prices in those grand, gilded palaces of fashionable dissipation and unparalleled extravagance, which make Paris so fascinating to that class of men,

from all parts of the world, who are are willing to pay more than the price of a week's board or of a barrel of lager bier at San Francisco, for a single bottle of champagne?

To tell the jury that these Paris retail prices were but "slight guides," was to allow them, at their option, to be guided in the verdict solely by what were really only "false guides" and illegal standards of prices and value.

Direct proofs of wholesale market values at Rheims could and should have been offered; or if there were no such value, then some other standard of value at Rheims should have been laid before the jury, such as cost, or cost with a profit added, at Rheims; (an instruction we shall soon see which was wholly refused by the judge,) and the jury, in no event, should have been allowed to be guided by the retail prices of Paris, until it was made to appear that there was no "actual market value" at Rheims, or other place near Rheims, at wholesale rates, that could be proved.

It is a striking fact that the agent of the Government did not *go to, or even inquire about wholesale or actual market rates at Rheims at all; nor was an attempt made by the District Attorney to take any proof in the usual or regular way, at that place, at any stage of the case.*

If the judge considered it might be found proved that there was no market value at Rheims, and hence that market values at other places could be proved, he should have told the jury not to be guided by Paris prices *only in the event* that they found there was no market value as Rheims.

Revenue Laws.

It will enable the remaining requests to be more satisfactorily presented, if attention is first directed to the various sections of the revenue laws applicable to this case, and to prayers of the libel.

(1.) The first act is that of 1799, 1 *U. S. Stat.* p. 627.

The § 66 and § 67, p. 677, are the only ones that can be claimed to be applicable, except that the § 71, p. 678, relative to *onus probandi*, is claimed by the Government to apply in its favor; and, if so, it affects the 9th request, fol. 43, of the *Veuve Cliquot* case, (which is No. 321,) and the corresponding request being really the *eighth* (fol. 37) of the Eugene Cliquot case, (which is No. 320.)

This § 66, it is well known, relates only *to purchased goods*, that is, to those purchased and not manufactured by the importer.

Alfonso *vs.* United States, 2 *Story's R.* 422.
The United States *vs.* 26 Bales, &c., 20 *Law Reporter*, (1857,) 10 *New Series*, pp. 444, 449.
United States *vs.* Sixty-Seven Packages, &c., 17 *How R.* 85.

Its forfeitures relate to goods, &c., which "shall not be *invoiced* according to the actual *cost* thereof at the place of exportation, *with design* to evade duties," &c. It allows forfeiture of such goods or recovery of value of owner, &c., "at the actual and real *cost*," as stated in the proviso. It relates to *invoices* and not to entries of goods.

The § 67 is confined to the case where "any packages examined shall be found to differ in their *contents* from the entry," &c.

It is obvious that the libel before the Court is not based on either of these sections.

Wood *vs.* The United States, 16 *Peters*, 432.
Buckley *vs.* The United States, 4 *How. R.* 251.

(2.) The act of 1818, (3 *U. S. Stat.* 433,) was limited to two years. (P. 438, § 26.)

(3.) The act of 1823, (3 *U. S. Stat.* p. 729,) seems to be the first act that included goods manufactured as well as those purchased by the importer. (§ 5, p. 732.)

The § 15, p. 735, of this act relates to *invoices*, as well those to which the goods "do not correspond" as to those that are "falsely charged" in such invoice, &c.; but this

section is repealed by the § 4 of the act of 1860. (4 *U. S. Stat.* p. 410, § 4.)

(4.) The act of 1830. (4 *U. S. Stat.* p. 509.) The § 4 of this act is material to be considered.

This section speaks of "goods imported," generally, without noticing the distinction of any prior statute between goods manufactured and those purchased by the importer, and may, therefore, be held to relate to both classes.

The language of the section is confined to frauds in reference to *invoices*, and can hardly be extended to *entries* at all; indeed, the word *entry* does not occur in the section. It also only relates to real, *intended* frauds, and not to constructive or inadvertent frauds, (if there can be such under the revenue laws;) but it does cover both the case where the goods "do not correspond with the invoice," and the case where they are "falsely charged in such invoice." It is therefore more comprehensive than the act of 1799.

A forfeiture is provided in two cases only; both relating to goods that pay ad valorem duties, viz.: (1.) "Where any package shall be found to contain any ar-"ticle not described in the invoice."

(2.) "If such package or invoice *be made up with in-*"*tent*, by a false valuation, or extension or otherwise, to "defraud the revenue."

It will be further noticed in the language above cited from the § 4 of the act of 1830, declaring the two grounds of forfeiture, that the first very clearly cannot be made applicable to the case before the court. And, therefore, the only applicable ground of forfeiture under that section is in case it is charged and proved that the "invoice" before the court was "made up with *intent*, by a *false* valuation, to evade or defraud the revenue."

(5.) The act of 1832. (4 *U. S. Stat.* p. 583.) The § 14 (p. 593) of this act repeals a part of the § 4 of the act of 1830, but it is not a part that can apply to the

case before the court. Yet, this § 14 contains a provision which may possibly be claimed to apply to this case, viz.: "if a package be made up with *intent* to evade or defraud the revenue, the package shall be forfeited." Still, like the § 4 of the act of 1830, this provision requires the condition of actual *intent to defraud* to be proved.

If the absence of proof of such an ingredient in making the invoice in controversy did not render the discussion immaterial to the present issues, it would here be argued:

(*a.*) That the § 14 of the act of 1832 only related to articles "composed wholly or in part of woollen and cot-"ton."

(*b.*) That said provisions are suspended by the § 21 and § 26 of the act of 1842. (5 *U. S. Stat.* pp. 565 and 566.)

NOTE.—This § 21 of the act of 1842, (if by any possibility it can be claimed to be applicable to this suit,) also requires the element of "fraudulent intent" to be proved as a condition of forfeiture.

(6.) This brings us to the act of 1863. (12 *U. S. Stat.* p. 737.)

It begins with providing *new requisites* in respect to invoices, and requires their production before consuls, &c., and a declaration to be endorsed thereon; and that such declaration shall state when and where the goods were purchased, &c., if they were purchased goods; and if they were "obtained in any other manner than by purchase, *the actual market value thereof, at the time and place when and where* the same were procured or manufactured, &c. The person producing said invoice must state the port of the United States at which it is proposed to enter the goods, &c.; and the facts of such production and declaration, &c., must be entered by the consul, &c., on *triplicate* invoices, (a new provision,) &c,

and one of them is to be forwarded to the Collector of the port where it is intended that said goods shall be entered.

No goods are to be "admitted to an entry" after July 1, 1863, unless the invoice presented conforms to this act, nor unless there shall be a Consular certificate, &c., nor "unless said invoice shall be verified by the owner or "consignee, or the authorized agent of the owner or consignee thereof," to the effect that "said invoice and declaration endorsed thereon are in all respects true."

Then comes the following provision of the first section: "And if any such owner, consignee, or agent, of any "goods, wares or merchandise shall *knowingly* make or "attempt to make any *entry* thereof by means of any "false invoice or false certificate of a consul, vice-consul "or commercial agent, or of any invoice which shall not "contain a true statement of all the particulars herein-"before required, or by means of any *other false* or "fraudulent document or paper, or of any *other* false or "fraudulent practice or appliance whatsoever, said goods, "wares or merchandise, or their value, shall be forfeited, "as *other* forfeitures for violation of the revenue laws."

It should here be noticed that this section, in making *new provisions* as to *entries*, refers and relies on the old and familiar ones as to *invoices*. Hence the words "*false* invoices" and "*other* false or fraudulent appliances" are used. For the meaning of a false or fraudulent invoice, &c., we are, of course, to look to the acts of 1799 and 1830, which have been so often adjudicated.

NOTE.—The concluding clause of § 1, is that relating to goods coming from any place beyond Cape Horn or the Cape of Good Hope, herein elsewhere referred to.

The § 3 makes any person guilty of *knowingly* doing what makes the goods subject to a forfeiture liable to fine and imprisonment.

The § 11 gives the District Attorney two per cent. on all moneys collected or realized in all suits or proceedings under the act.

It may be further remarked of the foregoing citation relative to the "entry," &c, from the § 1 of the act of 1863:

(*a.*) That it is the only clause of said act upon which it can be claimed this suit can be maintained.

(*b.*) That it is confined solely to wrongful *entries*, or attempts to make them, and does not forbid or attach any forfeiture or penalty to the making or to the attempt to make a false or fraudulent *invoice*. However false an invoice may be, and however fraudulent the intent with which it may have been made, no proceedings can be based thereon, and no consequences are declared to follow under the § 1 of the act of 1863.

This still more forcibly illustrates the remark already made, that for whatever can be the foundation of a forfeiture in connection with any thing false or fraudulent in an invoice, we must recur to the familiar acts of 1799 and 1830.

The same remarks as to this act being confined to entries, apply also to the § 3, which is also confined to *entries;* and, indeed, is equally applicable to the whole act, except the § 2 and § 7, which are broader, but do not apply to suits for forfeiture, or to suits to punish defrauders criminally.

(*c.*) The "owner, consignee and agent" seem to be treated as distinct persons, (at any rate, as that is the construction most unfavorable to the claimants, it will be that especially considered,) so that the act of either may cause a forfeiture of the goods.

And the § 3, by the use of the words "any person," appear to make each and all of them liable to be punished criminally.

Whether the theory of revenue laws, that treats the consignee as owner, is to be applied to this section, is not very material. It would seem that the real owner and the real consignee are those alone referred to.

It follows, that if the act of either of the said three classes

of persons may work a forfeiture, that the act of each is to be taken as a whole and by itself. It cannot therefore be claimed that what the agent *personally does* is (on any theory of the law of principal and agent) also done by the owner or consignee, by or through the agent.

(*d.*) The word "knowingly" clearly applies to all the means of procuring an entry to which a forfeiture is attached, as if repeated under each category. And whether the same is done by the owner, the consignee or the agent, it must have been done "knowingly" by either, or no forfeiture is denounced.

(*e.*) The only clauses that can be claimed to be available in this suit are the following: "By means of any false invoice or false certificate," &c., or "by means of," &c., "any invoice which shall not contain a true statement," &c. But before both these last clauses we must insert the phrase, "if any such owner, consignee or agent of any goods, &c., shall *knowingly* make, or attempt to make an *entry* thereof by means," &c.

The same reasoning applies to the § 3; and it would seem clear that the goods cannot be forfeited by reason of the act of a consignee or agent of the owner, without proof of such acts by such agent or consignee as would render them or one of them liable to be punished criminally under the § 3. And will it be pretended that an agent or consignee can be punished by imprisonment for "effecting an entry of any goods" for less than value, by using a false or fraudulent foreign invoice, without proof that he did it knowingly?

(*f.*) It will also be observed, that there is nothing in this § 1 which authorizes the penalty of forfeiture to be made out by uniting a partial violation of this § 1 of the act of 1863 with a partial violation of any prior act, such, for instance, as the § 4 of the act of 1830. Nor is there any warrant for combining the language of these two or any two acts together, to make out the forfeiture.

The forfeiture must be made out complete, if at all, under one act or the other, and not by any interweaving of their language.

THE LIBEL.

It contains but one count. It alleges that R. Fenerstein & Co., of San Francisco, are the "consignees" of the champagne.

That said R. Fenerstein & Co., "by *their* attorney or agent, F. Sievers," &c., "*made* an entry," &c., and "on such produced and left with the Collector, &c., said invoice," &c., "with the declaration endorsed," &c.; and then alleges that "said *invoice*, &c., were and are false and fraudulent," &c., and that "said *owner knew* that said invoice was false," &c. Then follows an averment that said R. Fenerstein and said F. Sievers, at the time of presenting said invoice, &c., and entering said goods, &c., *well knew* that said "invoice and declaration were false."

Up to this point it has not been stated at all that the owner *entered* the goods.

But then next follows an allegation that the "owner and consignee of said goods," &c., *and* said F. Sievers, "did *knowingly make an entry*," &c., "by means of a *false* invoice and of a *false* certificate," &c., "by reason whereof said goods," &c., "are forfeited," &c. (Fols. 1 to 5.)

(1.) It will be observed, that the only *entry* alleged against the owner is one made *jointly* with the consignee and agent.

(2.) That the only allegation of the libel that can be claimed to bring the case within the § 4 of the act of 1830, is the following, (fol. 4:) "false invoice," &c., and "false declaration, &c., with a design to evade some part of the duties lawfully chargeable thereon."

But if this language can be construed as adequate to bring the case within the provisions of the § 4 of the act

of 1830, (which the claimants deny,) the language of that § 4 being as follows, "if such, &c., invoice be made up *with intent*, by a false valuation, &c., to defraud the revenue," then the claimants maintain that it would clearly be necessary for the Government to prove that the invoice was made up "*with intent to defraud the revenue*" *on the part of the owner when he made up the invoice in controversy.*

(3.) And the claimants maintain further, that it is not permissible to claim a forfeiture under a libel containing only one count, under or upon either one of two statutes, as the Government may choose, especially when, as in this case, the consequences, both civil and criminal, are quite different, and there will be *nothing in the record to show under which statute the goods were declared forfeited.* We claim that it was indispensable that it should in some way with certainty appear in the libel under what statute the forfeiture was claimed, and the goods condemned. The cases which have gone to the extreme limits of construction and inference in favor of the Government, in revenue construction, require this; and all the cases of this nature claiming forfeitures under different statutes, contain counts based distinctly on the different statutes.

Buckley *vs.* United States, 4 *How. R.* 251, 252 and 262.

Wood *vs.* The United States, 16 *Peters' R.* 342, 343.

Clifton *vs.* The United States, 4 *How. R.* 243.

The libel in the last case contained thirteen counts.

If it be answered, to the last point, that the libel is wholly founded on the § 1 of the act of 1863, we can only respond that such would seem to be an inference naturally drawn from its language; but that on such construction of the libel, all benefit of former acts, *as substantial grounds on which to claim forfeitures*, must be regarded as abandoned by the Government.

The learned District Judge appears to have considered that the law of 1863 was the only one on which the suit was based. (Fol. 47.)

EVIDENCE AS TO ENTRY.

When we proceed to the proof as to who made the entry, we find that the owner *had nothing to do with it;* and that it was solely made and procured to be made by the consignee and the agent of the consignee. The nearest connection of the owner with the matter was that of forwarding an invoice to one "H. G. Schmidt & Co., "of New-York, who transmitted the same to R. Fener-"stein & Co., of San Francisco." (Fol. 15.)

Will the counsel for the Government pretend that this was "knowingly an attempt to make an entry," under the § 1 of the act of 1863? If so, the goods might have been seized, and the forfeiture was fully incurred before the goods left the harbor of Bordeaux. Indeed, if the energetic Naval Officer had taken the District Court with him, he might have had the goods condemned by a court sitting in a Paris *café*, when the goods were on the piers of Bordeaux.

Unless the foregoing is "to make or attempt to make an entry," within the meaning of the § 1 and § 3 of the act of 1863, then these goods cannot under that act be forfeited by reason of any act of the owner.

Proceeding further in the record, we find that all preliminaries and the acts constituting the entry were done and taken by R. Fenerstein & Co. and F. Sievers, his agent. (Fols. 15 and 16.)

If it was conceded that they *knowingly* did what is charged in the libel, (*i. e.*,) "made an entry," &c., and that what is so proved in the record was solely done by them, will it be denied that they are liable to the punishment denounced in the § 3? And if one or each of them is the "any person" in that section referred to, can it be claimed on any thing proved in this record, that the owner in France is also that "any person," and liable to imprisonment under the act of 1863; whatever might be

his liability under the act of 1830, which refers to fraudulent invoices?

A clear understanding of what is meant by an *entry*, is a pre-requisite to any correct determination of what is meant by an "attempt to make an entry," &c.

An entry is not a series of acts, beginning in France, (or Australia,) initiated by a French owner, stretched across the Atlantic *via* Cape Horn, and completed some months later, by the joint co-operative acts of the consignee and the agent of the consignee.

The entry itself, in one sense, is an official custom-house paper, and the making of an entry is the filling and perfecting of that paper as the law requires, accompanied with certain official acts. An attempt to make an entry would be, at least, the attempt to actually do something which is a part of the making of an entry.

What constitutes making an entry in its complete sense is defined in the § 36 of the statute of 1799. (1 *U. S. Stat.* p. 655.)

The acts are such that the foreign owner, thousands of miles away, can have no possible legal or logical connection with them.

It can hardly be seriously claimed, that the mere intention (on the part of the foreign owner, if that were conceded, to have a false entry made, and thereby) to commit a fraud on the revenue, can be punished by forfeiture. If so, however, the answer is, that this court has decided the contrary.

"The law did not intend to punish the *intention*, but "the *attempt* to defraud the revenue." Marshall, Ch. J., in The United States *vs.* Riddle, 5 *Cranch R.* 312.

That case was far stronger than the present in favor of the Government, for an invoice that must have been false, *was actually presented to the Collector to have the entry made.* It was held not an attempt to make an entry. (See p. 311.)

The remaining requests are Nos. 3, 4, 6, 7, 8, 10 and 11.

We are now prepared to consider them, and will treat together such as bear on substantially the same points.

Before proceeding to the discussion, a general observation applicable to all of them may be made.

But looking to these requests it will be seen that in respect to all of them, the learned judge either wholly refused them, or only responded to them as stated in his charge to the jury, which may be found at fols. 46 to 71. Specimens of this disposition of them are found at fol. 37, &c., &c. And to make perfectly clear that he intended to finally refuse all the instructions he did not assent to, he says, at fol. 68: "I think that I have referred," &c., "to every point that it is necessary for me to touch "upon." And again he says: "Any instructions that "have been *asked* for and not given, and which have "*been departed from in terms*, the counsel on either "side may consider as *refused*." (Fol. 69.)

Requests Nos. 3 and 6.—They are to be found at fols. 37 and 40, and it will be convenient to consider them together.

They relate to the question whether the want of good faith or of knowledge of the requirements of the law on the part of the owners in making up the invoice, was a necessary ingredient to bring the case within the statute under which the action is brought. In other words, must fraud or bad faith on the part of the owners in making up the invoice be shown to establish the forfeiture.

Both these requests were refused when made, and there is nothing on the subject in the charge, and hence the jury were told that it was indifferent to the result whether or not the invoice was made in good faith and through ignorance or mistake, or whether it was made with intent to defraud. What the learned judge has said at fol. 66 has not escaped observation. It does not respond to the request or help the difficulties. He refuses the request, and it would seem because he supposed the word *knowingly* had, in the statute of 1863, been substituted for "intent to defraud." "Knowingly" relates to *entries*, the other words to *invoices*.

The two statutes of 1830 and 1863 do not relate to the *same subject matter*, and knowingly is not in any sense substituted for "fraudulently," or for "intent to de-

fraud." It is a new word in a new statute, relating to a new subject, and has clearly been erroneously applied by the learned judge. We say:

(1.) That if the case rests at all on the statute of 1830, or on any statute prior to that of 1863, the refusal of these requests is clear error, and the exceptions taken are fatal to the judgment, as all those statutes require fraudulent intent to warrant a forfeiture.

(2.) If the refusals can be justified because the action is solely founded on the act of 1863, and that therefore it is sufficient if it appear that the invoice is *false*, then it follows *that the action is solely for a forfeiture* for "knowingly" making an *entry* "by means of a false invoice or false certificate," &c., under the first section of the act of 1863.

NOTE.—Before considering the case in the aspect it will present under the 7th and 8th requests, if confined to the § 1 of the act of 1863, as just explained, attention should be called to an important point in the charge.

It appears at fol. 15 of the record, that the invoice and "declaration" were both made by "Baron de Sach, one "of the firm of Veuve Cliquot Pousardin." Now the learned judge in his charge, referring to the last recited facts, says: "He *forfeits these goods* if you believe that "*he knew this invoice* did not express their market value "—their actual market value." (Fol. 68.)

This direction was greatly calculated to mislead the jury. It could hardly be justified even if the action had been plainly under the § 4 of the act of 1830; for such a direction would not include "intent to defraud the revenue," which that act requires to warrant a forfeiture. And such a direction is clearly and *utterly inconsistent with any theory* of treating the action, if it is to be considered as founded on the § 1 of the act of 1863. It in fact draws the attention of the jury wholly from *all the material averments*, under the last named act, and tells them plainly, "if you are only convinced that Baron de "Sach knew this invoice not to express the market value,

"then you will render your verdict for the Government, "no matter what you think about any other part of the "case, or whether there has been any entry at all "proved."

This ruling certainly cannot be justified. And it only makes more plain the insufficiency of this libel, and illustrates the force of what has been said already of the need of separate counts, founded upon the different statutes. It is plain that the learned judge (as we may well suppose the jury to have been) was not a little confused as to whether the action was founded upon an alleged false entry, or upon an alleged false invoice. And in urging the insufficiency of the libel, we may call the attention of the court to the 11th exception, contained in the record at fol. 45.

Requests Nos. 7 and 8.—They are to be found at fols. 41 and 42. They claim in substance that if the action is to be regarded as founded on the § 1 of the act of 1863, and is for making an entry by means of a false invoice or declaration, that it must appear that R. Fenerstein & Co. or F. Sievers, *who made it*, or both of them, *knew or believed* the same to be false, &c. The requests were refused and exceptions were taken.

After what has been already said generally, there is no occasion to enlarge on these requests or the rule we claim. The requests were, when made, both refused, and there is nothing in the charge on the subject, except at fol. 67.

The statement at fol. 67, that the jury "were obliged to find the entry was made *knowingly* by means of a false invoice," taken in connection with his refusal to tell the jury that it was necessary for them to find that R. Fenerstein & Co. or F. Sievers so made it *knowingly*, &c., was equivalent to telling them that they might find that *some one else* so made the entry, (as, for instance, the owner,) or that they need not find that *any one* made it. No such ruling is warranted either by the law, the libel or the evidence; and the ruling and the refusal of the re-

quests was clear error. It must be found that the owner, agent or consignee made this entry.

What the learned judge says at fols. 68 and 69 as to his refusal and charge, and which has already been cited, applies also to these requests.

What he says at fol. 68 about the word "knowingly," has no application *as used by him* to the *entry;* but in the statute it is *applied to the entry* alone; whereas the judge applies it to the *invoice.*

We claim there is clear error in not telling the jury, as the § 1 of the act of 1863 requires, that it must appear that the entry (since the owner did not make it) was made by the consignee or agent "knowingly," (*i. e.*, "with knowledge," according to Webster,) that the *invoice or declaration was false.*

Request No. 9.—This is found at fols. 43 and 44, and relates to the *onus probandi.* The request was refused and exception taken; and at fols. 68 and 69, the learned judge applies the provision of the act of 1799 to this case, and decides that the Government has shown probable cause. It is obvious the ruling was very material to the result of the case.

The § 71 of the act of 1799 (the source of this doctrine of *onus probandi*) is confined to suits brought or seizures made (in its own language) "pursuant to this act," *i. e.*, said act of 1799. It was never considered to apply to suits followed by seizures under any other act, except where it had been by law extended to suits thereunder.

The § 7 of the act of 1830 refers to the act of 1799; the language of the act of 1830 is this: "All forfeitures "under this act shall be *sued for, recovered* and *distributed* "according to the provisions of the act," &c., of 1799.

The regulations on these subjects in the act of 1799 are contained in § 89 and § 91, p. 677 of 1 *U. S. Stat.*, and the rule of the *onus probandi* mentioned in the § 71 of the latter act is not, it would seem, made applicable to suits under the act of 1830.

It has been decided repeatedly in the Southern District of New-York that the *onus probandi* provision of

the act of 1799 does not apply to the act of 1830. The following is one example:

The United States *vs.* 1,406 Boxes of Sugar, Von Hoffman & Co., claimants. Before Smalley, J., June 26, 1862.

SMALLEY, J.—"I have already once this term ruled "that the 71st section of the act of 1799 does not apply "to the act of 1830. I have not ascertained that the "question has been before any court, or been passed "upon, but the more reflection I have given to that ques- "tion induces me to adhere to my first opinion, that the "71st section of the act of 1799 does not apply to the "act of 1830. I do not think the court are warranted "in extending that peculiar provision which changes the "whole burden of proof from the penal statute. There- "fore, in this case, the question of probable cause does "not arise for the court to pass upon. Then the inquiry "goes to the jury like any other case, to be determined by "the fair balance of testimony; and upon the motion "you (Mr. Evarts) submit, which I suppose is, that it be "taken from the jury on the idea that there is no evi- "dence tending to show fraud," &c.

This § 7 of the act of 1830 is far more restrictive than the § 12 of the act of 1832, (4 *U. S. Stat.* p. 593,) which possibly may be broad enough to extend the *onus probandi* provision to forfeitures under the act of 1832.

To the same effect may be cited the § 26 of the act of 1842, (5 *U. S. Stat.* p. 566.) It extends "the laws existing, &c., to the collection of the duties imposed *by this act*, &c., and to proceedings for forfeitures," &c. This is a far different provision from that in the § 7 of the act of 1830, and looks as if designed to cure defects of that act, and to include the *onus probandi* provision.

Proceeding to the act of 1863, it should be observed, that though this act twice refers to the act of 1799, once in the § 1 and again in the § 14, it nowhere, like the acts of 1830, (in a limited way, and the acts of 1832 and 1842 in general terms,) adopts, applies or extends the pro-

visions of the act of 1799, relative to suits, proceedings or forfeitures, or *onus probandi* to suits or forfeitures under the act of 1863. On the contrary, the § 14 of the act of 1863 *repeals* the § 89 of the act of 1799, which is the very section which the act of 1830 extends to suits under the latter act, and which is among those so extended or adopted by the acts of 1832 and 1842, as to suits under those acts respectively.

It is not to be presumed that so oppressive a rule as the one in question will be extended by construction or inference. It is against the theory of the American law, and has no foundation in the general principles of justice; and there is no statute authority for applying it to an action under the act of 1863.

In the case of Wood *vs.* The United States, 16 *Peters*, 342, where this rule of *onus probandi* was applied, the application was only made under counts especially based upon the § 66 of the act of 1799 and the § 14 of the act of 1832.

It appears at p. 344 that there were counts under three separate acts, those of 1799, 1830 and 1832. At p. 342 it appears that the court held that the rule of *onus probandi* applied as to the counts under the acts of 1799 and 1830, and not to those under the act of 1830.

Request No. 10.—This may be found at fol. 44; and, in view of the language of the learned judge at fol. 67, there is not perhaps any occasion to say more upon the subject of this exception than has been already said under various other exceptions.

Request No. 4.—This may be found at fol. 38. There was a refusal, and exception taken; and the charge says nothing on the subject. What is said at fol. 69 as to instructions, enables us to consider this as a request intended to be absolutely refused.

The request is founded on the last clause of the § 1 of the act of 1863, which limits its application as to articles

imported from "beyond Cape Horn or the Cape of Good "Hope, until the first of January, 1863."

It is familiar knowledge that similar provisions are contained in several revenue laws.

We claim that the meaning of the *last proviso to the first section of the act of* 1863, (12 *U. S. Stats.* 739,) *is, that the provisions of the act shall not apply to invoices of goods, wares or merchandise imported into the United States from any place beyond Cape Horn or the Cape of Good Hope, when said invoices were made up at any time prior to the first day of January*, 1864.

The language of the proviso is as follows :

"And provided further, that the provisions of this act "shall not apply to invoices of goods, wares or merchan- "dise imported into any port of the United States from "any place beyond Cape Horn or the Cape of Good "Hope, until the first day of January, eighteen hundred "and sixty-four."

Now what was the intent of Congress in employing and arranging these words as they are above quoted? Without subjecting the sentence to an exact grammatical analysis, and without using precise technical terms, let us separate it into its natural parts, and see to what extent this process will assist us in ascertaining the true meaning.

"The provisions of this act" "shall *not* apply"—to what? The learned counsel for the United States would probably say "to goods, wares or merchandise imported into any port of the United States." But, if so, what office does the word "invoices" or the preposition "of" fulfil? Will it be seriously asserted that the term "invoices" is *descriptive* of, or that it in any way qualifies the words that follow?

Suppose the proviso had been thus constructed: "The provisions of this act shall not apply to *invoices* until the first day of January, eighteen hundred and sixty-four," would a doubt have been suggested of the applicability of the exception to an invoice made up on the last day of

December, 1863, no matter at what time the *goods* designated in that invoice might have reached San Francisco? Now, between "invoices" and "until" insert the words "of goods, wares or merchandise imported into any "port of the United States from any place beyond Cape "Horn or the Cape of Good Hope," and what other possible effect can these words have than to restrict the generality of the term "invoices," by *specifying* the particular invoices meant. It seems to us that their combined force is simply that of an adjective which qualifies the antecedent noun.

"The provisions of this act" "shall not apply" "to invoices."

To what invoices? "To invoices of goods, wares or merchandise." To invoices of *what* goods, wares or merchandise? "To invoices of goods, wares or merchandise imported into any port of the United States from any place beyond Cape Horn or the Cape of Good Hope."

It will be remembered that one of the subjects of the act is *invoices*. To the mode in which *invoices* are to be prepared, verified and certified, the attention of Congress seems to have been particularly directed. The conformity of the invoices to the requirements of the act, is made the condition precedent to entry, and the non-conformity of the invoices to those requirements, or the falsity of the invoices, followed with an attempt to make an entry, is made the condition precedent to forfeiture. It is therefore evident that the object of Congress in adding the proviso, was to except a distinct class of *invoices* for a limited period from the operation of the act.

It is useless further to elaborate this branch of the argument, for the construction for which we contend gives to the proviso its natural, obvious and grammatical meaning, and no other construction is possible which logically, at least, would not be absurd.

At the beginning of that section it is enacted "that *from and after* the first day of July, eighteen hundred and sixty-three," invoices shall be made in triplicate, and signed by the owner or manufacturer, or by his agent, when the goods were procured otherwise than by pur-

chase; that certain declarations shall be endorsed upon them; that they shall be produced to the consul or other proper officer nearest the place of shipment, and shall be by him certified and distributed.

12 *U. S. Stats.* 737, 738.

Up to this point it is apparent that no change whatever in the manner of making up invoices is contemplated until the first day of July, 1863. Upon this point, the words "*from and after* are clear and emphatic. "But we now come to another part of the section (12 *U. S.* "*Stats.* 738) in which it is provided that no goods, wares "or merchandise imported into the United States from "any place or country *after* said first day of July, "eighteen hundred and sixty-three, shall be admitted to "an entry, unless the invoice presented shall *in all* "*respects* conform to the requirements hereinbefore men-"tioned," &c. So that, in one place, really the most essential part of the whole act, importers are virtually prohibited from making up their invoices in the new mode until the first of July, 1863, and, in another place, their goods arriving after that date are refused entry unless the invoices presented are so made up. Here is a distinct repugnancy between two parts of the same section. Invoices are to be prepared in the manner directed by the act, in the country whence the importation is made, but they are not to be, or at least need not be, so prepared until "*from and after*" July 1st, 1863. And yet, if the language of the section were to be followed, goods arriving on the second of July, 1863, would be refused an entry, because the invoices presented did not match with the terms of the act. The difficulty moreover, could not be overcome, because the invoices must be signed and presented before or at the time of shipment. The innocent and unfortunate importer, therefore, would be driven either to submit to the loss of his goods, or to suffer the great delay and heavy expense involved in an application to the Secretary of the Treasury.

Can it be presumed that Congress *designed* to produce

this conflict between the terms of the section? Of the conflicting parts of the section, then, which shall give way? How shall they be reconciled? Shall the date of the invoice, or the date of the importation, that is, the date of the arrival of the goods, control in the construction of the law?

The answers to these questions on various grounds must be conclusive as to the interpretation of the proviso. The court has the right, and the duty is imposed upon the court, so to frame its answers as to remove all inconsistencies, and to harmonize the laws.

The act of 1863 was passed on the third of March of that year, and the operation of that part of the first section prescribing the mode of making up the invoices was postponed until the first of July following, for the evident purpose of allowing merchants or manufacturers in places *not* beyond Cape Horn or the Cape of Good Hope, four months' time, within which to become familiar with the new law. The period fixed, as to such merchants and manufacturers, was reasonable and just.

It is evident then that, in the body of the first section, the date of the invoice was intended to determine the question as to whether a given case would or would not fall within the law.

By strict analogy, the same construction of the proviso must be adopted; and it must be held that the time there specified applies also to the date of the invoice, whether the strict letter of the proviso justified that construction or not. But there is another view of the subject equally conclusive. We assume that it is fully shown that the first section can act only upon invoices dated after July 1st, 1863.

It will not be denied that in adopting the proviso, Congress designed to give merchants and manufacturers in places "beyond Cape Horn" a period of six months, over and above the period granted to other manufacturers and merchants, within which to learn of the existence of the law and to familiarize themselves with its provisions.

But any other construction of the proviso than that

upon which we insist, would be inconsistent with the interpretation of the body of the section, would place all merchants and manufacturers practically upon a dead level in point of time, without reference to the places of their residence, and thus the proviso would become lifeless, and that principle of law, which requires effect to be given to every part of a statute, would be disregarded or overridden.

A proviso, "in deeds and laws, is a limitation or *exception* to a grant made or authority conferred."

Voorhees *vs.* Bank of the United States, 10 *Pet.* 471.

"The proviso is generally intended to restrain the "enacting clause, and to *except* something which would "otherwise have been within it, or, in some measure, to "modify the enacting clause."

Wayman *vs.* Southard, 10 *Wheat.* 30.

But it may be claimed that the port of Bordeaux is not a "place beyond Cape Horn," within the meaning of the proviso; and that to construe the proviso as applicable to such proceedings here, would cause confusion in the administration of law by permitting two different acts to be in operation at the same time, in different parts of the United States; and that, therefore, it must be intended that, by the expression "any place beyond Cape Horn or the Cape of Good Hope," Congress meant any places beyond those points by geographical relation to the seat of Government.

The supposed difficulty may be variously answered:

1. There is nothing in the Constitution of the United States which requires laws to be uniform in their operation, and there is no principle of law with which the existence and independent operation of two acts of Congress upon the same subject, in different parts of the United States, would conflict.

2. By the very terms of the proviso, importations to San Francisco *via* Cape Horn, from any part of the

world, form one of the cases which it was intended to cover.

3. It is worthy of remark, that this proviso does not necessarily fix the rate of duties to be charged, but seems to leave them where they were before. It only applies to invoices, and the condition in regard thereto, which requires a declaration to be endorsed thereon, and, of course, therefore to the statement as to the market value.

No difficulty can therefore arise to the effect that the construction we claim would make the rate of duties on goods between July and January, 1864, from the same place, if imported into the port of New-York, one rate, and if into the port of San Francisco, another rate; and that therefore the provision of the Constitution of the United States would be violated which forbids giving preferences to ports of one State over those of another. There is a simple variation in the details of an invoice, or rather in the endorsement or declaration to be put thereon.

4. It may be held in regard to this that the terms, beyond the Cape of Good Hope, means east thereof; and that the term beyond Cape Horn, means west thereof.

In a case arising under the § 14 of the act of July 14, 1862, (Haddon *vs.* Barney, which arose in New-York, and has not been reported,) Judge Nelson did in substance so hold in respect of the Cape of Good Hope.

This ruling does not, however, seem to materially relieve some difficulties growing out of the subject, and which arise from the vast breadth of our maritime coast.

It does not decide whether the point from which east or west is to be measured, is to be Washington or the port of entry.

Besides, if these statutory phrases are to be taken as the simple equivalents of east and west from the meridian of Washington, a point on the coast of China or in Siam would be both east and west, as they are the antipodes of Washington. And if beyond Cape Horn means west

of Cape Horn, then all the western coast of South America and Mexico are included, even though the shipments were made to San Francisco. Indeed, this act would not apply till January 1st to a shipment by the direct mail line from Panama or Acapulco to San Francisco.

It is submitted that the most just and practicable rule is to reckon beyond the Cape of Good Hope or Cape Horn from the port of entry.

Policy and Justice.

I am aware of the rules of construction of revenue laws which have been sanctioned by this court, and which certainly seem a departure from ordinary rules of construction, and tend far toward a theory that all such laws are to be so construed as yield the greatest amount of revenue.

Wood *vs.* The United States, 16 *Peters' R.* 343.
Taylor *vs.* The United States, 3 *How. R.* 197.
Buckley *vs.* The United States, 4 *How. R.* 251.
Ex parte Ellis, 11 *Cal. R.* 224.
Alexander *vs.* Washington, 5 *Maryland R.* 485.
United States *vs.* Fisher, 2 *Cranch R.* 385.
18 *Viner's Abridg.* 519, 526, 528.
Ryegate *vs.* Wardsboro', 30 *Vermont R.* 749.

I fully recognise the fact that no litigant will meet with more indulgence before this high tribunal than the merchants of foreign countries; and I know at the same time that no reasons but those founded in the record and the laws and policy of the nation will affect or ought to affect your decision.

While therefore it is not proper before this tribunal to depart much from the limits of purely legal discussion, it may be permissible to briefly allude to the nature of the questions before the court. For a long series of years the trade in champagne between this country and France has been conducted upon the basis of the present valua-

tions. No objections have been made and no notice given to the importers that any attack upon them was to be made or that any dissatisfaction existed with their invoices.

Year after year there have been custom-house valuations, based on the same theory of value as these invoices. The shippers have thus been led to believe that this Government did not object to these valuations, and have conducted their business with the most unsuspecting confidence.

There is every reason to believe that the invoices in question were made precisely as those for ten years previously had been, and in the exercise of most perfect good faith.

All of a sudden the custom-house officers, having sent one of their number abroad and carefully laid their plans, pounce down upon the unsuspecting importer and bring him to sudden condemnation, and impose upon him immense pecuniary losses.

For it is not these cases alone and the large amount they involve that you are now to decide, but other large claims for forfeitures in San Francisco and New-York are depending on their issue. And there are also claims for alleged back duties of immense amount.

This case does not illustrate that theory of official action that seems fair and just to the subjects of a friendly maritime State, which is bound to the United States by so many grateful memories of her noble co-operation with us in the terrible struggle of our revolutionary birth; nor does it seem to comport with those higher and more generous principles of national intercourse, between great commercial and Christian races, which have superseded that older doctrine which treated all foreign States and subjects as quasi-enemies, and all revenue laws as occupying a domain within which courtesy, comity and justice were unrecognised and unknown.

It cannot be denied that, with no inconsiderable foundation in justice, the merchants and government of France will regard the early proceedings in this matter as characterized by much unscrupulousness and severity; and

they were certainly of a character to provoke retaliations that will not tend to promote the interests of general commerce, nor those friendly feelings between the people of the two nations on which the prosperity of all profitable and honorable commerce is founded.

The motives which this proceeding charge upon the owners of these champagnes are of the most offensive character, and no such charge can even be warranted or sustained, except upon the clearest proof. There is no such proof in the case; and the enlightened mercantile community of Europe, to whom the high and honorable character of the claimants is well known, will never accept the judgment censuring their character rendered in this suit, unless it shall have some better foundation than vague suspicion, unfriendly prepossessions and deductions from inconclusive and unauthorized testimony.

I believe that to release the property seized and to allow the proceeding thus far to operate only as a friendly admonition to the merchants of France, will enlarge the commercial dealings between the two nations, increase the revenues of this Government from foreign imports, and illustrate our appreciation of the good-will and the generous policy that should characterize the commercial intercourse of friendly nations.

Chancellor Kent declares that the "law of nations en-"joins upon every nation the punctual observances of "*benevolence and good will* as well as of justice toward "its neighbors. This is equally the *policy* and duty of "nations." 1 *Comm.* p. 32.

It becomes the United States, and well comports with her historic fame, to assume the highest grounds of justice and liberality in all her dealings with other nations. The spirit of her foreign intercourse and the tone of her executive and judicial administration should never fall below the justice and the equity in which her laws and her constitution are founded. Let no European merchant ever be able to say with justice that the administration of the laws of the United States is not in harmony with the spirit of that great national compact which is the

wonder and the aspiration of Europe and the guaranty and the glory of America. If there is any nation that can afford to be and ought to be more just and lenient than any other in the administration of her revenue laws, that nation is the United States; and there never was a fitter era than the present to make that honorable pre-eminence manifest to the commercial world.

D. B. Eaton,
Of Counsel for the Claimants.

MEMORANDUM.

In order to pass goods through the Custom-Houses of the United States, under our revenue laws, four papers are required, to wit: Bill of Lading, Invoice, Certificate or Declaration, and Entry.

It is not necessary to consider the bill of lading.

Invoice.

Every body understands what is the definition of an invoice in general commercial law, but in our revenue law it has a peculiar meaning.

The first law of the United States which contains positive directions as to what an invoice, for custom-house purposes, shall contain, is the second section of the act of Congress of March 3, 1801. (2d vol. *Stats. at Large*, page 121.) This section provides, "that from and after the 30th day of June next, the invoice of all goods, imported into the United States, and subject to a duty *ad valorem*, shall be made out in the currency of the place or country from whence the importation shall be made, and shall contain a true statement of the actual cost of such goods in such foreign currency or currencies," &c.

The next law, touching the subject of custom-house invoices, is the 4th section of the act of Congress of March 1st, 1823. (3d *Stats. at Large*, page 730.) This section gives the form of oath to be administered to the owner of the merchandise at the port of the United States at which the importation is made. According to the

form prescribed by this law, the consignee or agent is required to swear, among other things, "that the invoice now produced by me exhibits the actual cost (if purchased) or fair market value (if otherwise obtained) at the time or times, and place or places, when and where procured, (as the case may be,) of the said goods, wares and merchandise; all the charges thereon, and no other discount, bounty or drawback but such as have been actually allowed on the same."

This oath, required to be taken on entry at the custom-house, of course, implies that the invoice is to be made up in accordance therewith.

The next legislation, on the subject of invoices, is the 17th section of the act of July 14, 1862. (12th vol. *Stat. at Large*, page 558.) The effect of this legislation is, that the invoice, (if of goods subject to *ad valorem* duty, and obtained by purchase,) shall contain the actual cost thereof, all charges thereon, and no discounts, bounties or drawbacks, except such as have been actually allowed; and when the goods are procured in any other manner than by purchase, the actual market value thereof; and if subject to specific duty, the actual quantity thereof.

It is important to observe, that this 17th section does not specify the *time* and *place* on which the actual cost or actual market value shall be predicated in the invoice; that is, whether it shall be at the time and place of purchase or manufacture, or the time and place of exportation to the United States.

The next legislation, in respect to the contents of the invoice, is the 1st section of the act of March 3, 1863. (12th vol. *Stat. at Large*, page 737.) This section enters more into detail than any preceding legislation, as to what an invoice shall contain, and it *fixes* the time and place in respect to which value shall be predicated. This act of 1863 provides that an invoice of purchased goods, subject to *ad valorem* duty, shall contain: (1.) A true and full statement of the time when, and place where, the same were purchased; (2.) The actual cost thereof; (3.) All charges thereon; (4.) No discounts, bounties or drawbacks but such as have been actually allowed; (5) If subject

to specific duty, the actual quantity; and (6.) The currency which was actually paid for the goods by the purchaser.

In respect to goods procured in any other manner than by purchase, the act of 1863 makes the invoice thereof different from the invoice of purchased goods, only in the fact that the invoice of the former, (that is, manufactured goods,) instead of giving the actual cost at the time and place of purchase, shall give the actual market value thereof at the time and place of procurement or manufacture. These three acts contain all Congressional requirements of what an invoice shall contain, for custom-house purposes.

Declaration.

The eighth section of the Tariff Act of 1818 (3d vol. *Stat. at Large*, page 435) is the first statute which gives American consuls any supervision over merchandise imported to the United States. The pertinent language of this section is as follows:

"Goods, wares and merchandise imported and subject to duty as aforesaid, and belonging to a person or persons residing, and at the time of such importations being out of the United States, shall not be admitted to entry unless the invoice thereof shall be verified before the consul of the United States. And such owner or owners shall declare, on oath, whether he or they are the manufacturers, in whole or in part, of such goods, or are concerned, directly or indirectly, in the profits of any art or trade by which they have been brought to their present state of manufacture; and if so, he or they shall further swear that the prices charged in the aforesaid invoice are the current value of the same at the place of manufacture, and such as he or they would have received if the same had been there sold in the usual course of trade."

This act, it will be seen, required the owner residing abroad to swear to the cost of the goods, if purchased, or market value, if manufactured, before a consul of the United States. Owing to the difficulty experienced,

especially in Great Britain, where objection was made by that government to allowing their subjects to be called before a foreigner and put under oath, the seventh and eighth sections of the act of March 1, 1823, (3d vol. *Stat. at Large*, page 733,) provided a relief in that respect by authorizing foreign owners to make oath before a magistrate of the country, and then carry the invoice before a consul of the United States, who is required to certify that the person taking the declaration is a magistrate, and the certificate entitled to full faith and credit.

Up to this time, it will be observed, that the only invoices to be certified were those of goods *subject to ad valorem duty*, and owned by persons *residing abroad*, and, therefore, to provide for goods subject to specific duty, the 17th section of the act of July 14, 1862, required, among other things, ALL invoices to be certified, under oath, before an American consul. It excluded the magistrate. This provision brought back the old difficulty which arose under the act of 1818. Therefore, on the 3d March, 1863, instead of requiring the owner to go before the consul to make *oath* to his invoice, nothing was required but an endorsement upon the invoice, or a declaration signed by the purchaser, manufacturer, owner or agent, setting forth that the invoice was in all respects true, &c.

Pursuant to this act instructions were issued to consuls, furnishing them with forms for the declaration required. *Declarations* are now required instead of *oaths*. The forms of this declaration are provided for in circular No. 35, issued by the Department of State, April 27, 1863, forms Nos. 142 and 143. It will be observed that the declaration required by the act of 1863 must be endorsed on the invoice, when the latter is produced to the consul, and the consul then gives a certificate of the production, the name of the person producing, and the port of the United States to which the invoice was destined.

This legislation really makes the *declaration* distinct from the *certificate* of the consul, and so makes *five* papers required to pass goods through the custom-house, to wit: Bill of Lading, Invoice, Declaration, Certificate of Consul and Entry.

Entry.

On the arrival of merchandise at the port of entry, the first step to be taken, (after making entry of the arrival and manifest of the ship,) in order to pass merchandise through the custom-house, is to make the entry thereof. The 36th section of the act of March 2, 1799, is the first legislation which describes what this entry *paper* shall contain. This law says: (1.) That the entry shall be in writing; (2.) Shall be made with the collector; (3.) Shall specify the vessel and the master's name; (4.) The port from which the merchandise has been brought; (5.) The particular marks, denomination and prime cost of the merchandise; (6.) Charges of each particular package or parcel, or if in bulk, the quantity, quality and prime cost; (7.) The species of money in which the invoice was made up; and then goes on to prescribe a form for this entry, and the oath to be attached thereto. It is made, by Treasury regulations, the duty of the collector, or his clerks, to compare the entry with the invoice and the accompanying papers, and estimate thereon the amount of duty to be deposited by the person making the entry, in order to secure delivery on penal bond, when required by the collector, of such portion of the merchandise as is not sent to the appraisers' stores for examination. The importer is required, by Treasury regulations, to state on the entry what rate of duty each description of goods contained thereon pays. It will be observed that upon this entry paper are made *all computations of duty*. The *entry* is retained in the office of the collector, while the *invoice* is sent to the appraisers for their information and guidance, thus recognising in practice a distinction bebetween the two papers. (See Appendix from *Treasury Reg.*)

All of these acts of Congress, from 1799 to 1863, were passed for the protection of the revenue of the United States, and to enable custom-house officers to collect duties on imported goods in the easiest, surest and simplest manner.

At the organization of the Federal Government, the

system of government appraisers of imported goods commissioned by the President and Secretary of the Treasury was unknown.

The 49th section of the act of 1799 provided that the collector should estimate the amount of duties upon *the facts presented to him on the invoice and entry.* It was assumed that the value would be correctly stated therein. The 52d section of the same act provided that, in case the entry shall be incomplete, or without the specification of particulars, either for want of the original invoice or for any other cause, or if the merchandise shall have received damage during the voyage, then there should be an appraisement by two merchants, one to be appointed by the collector, and the other to be appointed by the importer. Thus it happens that the act of 1799, in order to secure an honest invoice, provided in the 66th section, that if any goods shall not be invoiced according to the actual cost thereof, at the place of exportation, with design to evade the duties thereupon, or any part thereof, all such goods, or the value thereof, to be recovered of the person making the entry, shall be forfeited. And in the 67th section it was provided that if any goods were stated on the entry paper by a false denomination, the same should be forfeited. It was not until the act of April 20, 1818, that Congress provided for the appointment, by the President, of custom-house appraisers, and provided in that, and subsequent acts, that the value, fixed by the appraisers, should be considered the value for the purpose of estimating duty. When this system was inaugurated and fairly under way, Congress provided, in the act of 30th May, stringent legislation to secure the production of an honest invoice, the object being to inform the judgment of the appraisers by an invoice as to the value of the different kinds of merchandise constantly passing through their hands. It was as vital to the revenue to secure an honest invoice under the appraisement system as it was under the old system of assessing duty upon the invoice, for one dishonest invoice would poison the judgment of the appraisers, in

respect to many subsequent importations, and thus seriously diminish the revenue.

Not long after complete adoption of the appraisement system, Congress inaugurated legislation requiring the importer (no matter what might be the price stated in the invoice) to state on the entry paper *the actual market value of the goods*, the purpose being to provide for cases where goods were purchased at a price greatly under their real value, or where the value had increased since purchased. The law previously required the importer of purchased goods to state in his invoice the actual cost. It now permits him to add on the entry, in order to bring the invoice value up to the true market value. But, in order to compel the importer to be attentive to this last requirement, Congress provided that if the appraised value exceeded the entered value by a certain per centum, then the collector should impose an additional duty by way of punishment for the neglect. The latest legislation on this subject of additional duty, if the appraised value exceeds the entered value, will be found in the 23d section of the act of June 30, 1864. The government appraisers are now required by law to ascertain the value of imported merchandise in the principal markets of the country from which it is brought, at the period of exportation to the United States. While the invoice to be presented at the custom-house must, if the goods be purchased, state the actual cost at the time and place of procurement, and if manufactured, the actual market value at the time and place of manufacture. It will be seen, therefore, that the invoice refers to a different time and place from that upon which the appraisers must predicate the value. Thus showing that, under the existing system, the invoice is only a document required for the information and guidance of the appraisers.

This review of the legislation of the United States, made to secure prompt and safe collection of the revenue, will be found a useful guide to enable the court to reach a correct interpretation of the first section of the act of March 3, 1863.

At the time of the passage of the last named act, the

existing provisions of law were ample to secure a confiscation of merchandise entered at the custom-house upon a *false invoice*. Nothing could be broader or more effective than the language of the 4th section of the act of 1830 in respect to an invoice. It forfeits all the merchandise contained on an invoice, if the jury find that the invoice was made up with intent to evade the payment of duty legally chargeable thereon. Therefore no legislation was needed upon the subject of an invoice.

In respect, however, to a false declaration, or a false entry, the law was defective and insufficient. The 67th section of the act of 1799 was the only law which, up to March 3, 1863, forfeited the merchandise for a false statement in an entry paper, and that section only forfeited when the goods were described in an entry by a false denomination. Of course, that permitted to go unpunished a vast quantity of statements which might be made in an entry paper, calculated to mislead the entry clerks at the custom-house, and thus defraud the revenue. To provide for this omission, was one of the chief purposes of the first section of the act of 1863, and upon close inspection of the confiscation clause of the first section of the before mentioned act, it will be seen that, despite the verbiage used, the thing punished is the making of a false entry by any false or fraudulent practice or appliance whatsoever. It is false statements knowingly made in the entry paper, which the first section of the act of March 3, 1863, punishes.

Incidentally the first section inaugurates the system of triplicate invoices. It also states more in detail what shall be contained in an invoice; it describes a new form of declaration, which shall be appended to an invoice, and makes this declaration a part of the entry, so as to forfeit the goods if the declaration be false. But it does not modify the circumstance under which the merchandise can be forfeited because accompanied by a false invoice.

The whole structure of the revenue law proceeds upon the theory that honest importers are to be protected. The Government does not intend to entrap merchants by

complicated forms, or to confiscate their property, unless the merchandise is invoiced and entered with a fraudulent intent to evade the payment of duty legally chargeable thereon, and this act of 1863 has not changed the general principle. Therefore, if the Government claim that merchandise is forfeited by reason of a false invoice, then the prosecuting officer must satisfy the jury that the person who made up the invoice did it with intent to defraud; and so, if the Government alleges that merchandise is forfeited under the act of 1863 by reason of a false entry, the prosecuting officer must satisfy the jury that the person who made the entry did it knowingly. So, also, in respect to a false declaration.

This theory of our revenue system is confirmed by the legislation of June 30, 1864, section 23d, to which reference has been made. Congress there provides for cases of honest undervaluation, and the punishment is *additional duty of* 20 *per cent.* In a word, the law says, that if an importer wilfully, knowingly or fraudulently undervalues his merchandise or makes incorrect statements, either in the invoice or declaration or entry, the whole of the merchandise shall be forfeited; but if, on the other hand, the undervaluation or false statements were made by accident or mistake, without intention to defraud, then the Government, instead of taking *all* the merchandise, shall forfeit *one-fifth*, that is to say, twenty per centum. See, upon this point, United States *vs.* Sixty-seven packages, 17 *Howard*, page 85.

The settled policy of the courts of the United States has always been to consider and interpret each tariff law as a part of a system. The judges have repeatedly repelled efforts to treat the different tariff acts as independent one of another, unless there be something in the language used (as in case of burden of proof) which requires a different construction. The revenue laws are construed so as most effectually to accomplish the intents of the legislature. See Taylor *vs.* United States, 3 *Howard*, 199; Adams *vs.* Bancroft, 3 *Sumner*, 386; United States *vs.* Breed, 1 *Sumner*, 159.

EXTRACTS FROM GENERAL CUSTOM-HOUSE REGULATIONS.

234. With a view to uniformity in practice at the several custom-houses in respect to the entry of merchandise, it is deemed proper to state, in addition to the general provisions on the subject in these regulations, that the importer should be required to carry out in his entry the value of each description of goods paying a different rate of duty, under the appropriate head of 5, 10, 15, 20, 25, 30, 40 or 100 per cent., as the case may be. The clerk charged with the examination of entries will compare the classification made by the importer with the description given in the *invoice*, and see that the several articles are *entered* at the rates provided by law, it being considered that the determination of the schedule under which merchandise may be admitted to entry, devolves upon the Collector, and is a part of his proper duties. For the information of the appraisers, and to ensure the correct classification, the rates at which articles of merchandise are allowed to be entered, will in all cases be noted by the Collector against such articles on the invoice, either by figures, at five per cent., ten per cent., &c., or by the letter representing the schedule of the tariff act, under which, in his opinion, they are chargeable. This will be done at time of entry, and before the *invoice* is transmitted to the appraisers for examination. It is also required, that all additions for charges and commissions, as well as additions by importers, under the 8th section of the act of July 30, 1846, should be noted at the foot of the invoice, so that the appraisers may be informed of the precise value declared ON ENTRY.

235. The 23d section of the act of March 1st, 1823, provides, "that when any goods, wares or merchandise shall be admitted to an entry upon invoice, the Collector of the port in which the same are entered shall certify the same under his official seal." In accordance with this requirement, each and every invoice, as soon as entered, will be stamped with the date and fact of entry, and signed by

the Collector; the certificate being put upon the invoice itself, and not upon the envelope or wrapper. A careful adherence to these suggestions will, it is believed, obviate confusion, and ensure a more accurate transaction of the customs business.

236. After the examination has been made by the appraisers, and their returns stated *on the invoice*, in the manner directed in these instructions, they will return the *invoice* to the Collector, who, together with the Naval Officer, will examine their return by the original ENTRY, and if the *latter* be found correct, a special permit will be issued by the Collector for the delivery of the examined packages.